TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~711~~ 28

MAXINE K. HINKLE, ADMINISTRATRIX OF THE ESTATE OF W. MAX HINKLE, DECEASED, AND MAXINE K. HINKLE, PETITIONERS,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 8, 1958
CERTIORARI GRANTED MARCH 10, 1958

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,740

CIVIL.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS, APPELLANT,

VS.

MAXINE K. HINKLE, ADMINISTRATRIX OF THE ESTATE OF W. MAX HINKLE, DECEASED, AND MAXINE K. HINKLE, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF IOWA

INDEX.

	Original	Print
Stipulation of Counsel approving Record on Appeal, etc.	1	1
Recital that United States District Court for the Southern District of Iowa, Central Division, had Jurisdiction of Cause and that the Case was properly removed by Defendant from the District Court of the State of Iowa in and for Polk County	1	1
Petition filed in District Court of Polk County, Iowa	2	2

	Original	Print
Exhibit A, Conditional Receipt of New England Mutual Life Insurance Company issued to W. Max Hinkle	2	2
Answer	6	6
Exhibits	16a	17
1, Conditional Receipt of New England Mutual Life Insurance Company issued to W. Max Hinkle (Offered in Evidence as Exhibit 1)	16a	17
2, Part I of Application of W. Max Hinkle for Insurance with New England Mutual Life Insurance Company (Offered in Evidence as Exhibit D)	16a	19
Reply	17	21
Abstract of Evidence	23	28
Caption	23	28
Testimony for Plaintiff	23	28
Maxine K. Hinkle	23	28
Exhibit 1, Conditional Receipt of New England Mutual Life Insurance Company issued to W. Max Hinkle, Memorandum as to	23	29
Berniece Hansen	23	29
Testimony for Defendant	25	30
Edward R. Posner	25	30
Exhibits A 1 and A 2, Memorandums of Appointments, Memorandum as to	26	32
Rodney Bliss, Jr.	26	32
Exhibits	32	36
B, General Agency Contract between Rodney Bliss, Jr., and New England Mutual Insurance Company, effective January 1, 1954	32	36
C, Pamphlet on Decreasing Term Policy Premium Rates	34	38
D, Part I of Application of W. Max Hinkle for Insurance with New England Mutual Life Insurance Company (Exhibit 2 to Answer)	35	40
E, Check, W. Max Hinkle to New England Mutual Life Insurance Company, $21.70, February 25, 1955	36	40
F, Letter, Rodney Bliss, Jr., General Agent, to Ray Nyemaster, March 7, 1955	36	40
G, Letter, Rodney Bliss, Jr., General Agent, to Mrs. W. Max Hinkle, May 19, 1955	37	41
H, Aviation Questionnaire of New England Mutual Life Insurance Company	38	42
I, Amendment of New England Mutual Life Insurance Company limiting Aviation Coverage	40	44
Doane Arnold	43	46
Exhibit J, Form of Report of Retail Credit Company Headed "Special Narrative Life Report"	45	48
Stipulation as to Aviation Activity of W. Max Hinkle	47	49
Exhibit K, Certificate of Civil Aeronautics Administration relating to W. Max Hinkle	48	50
Robert W. Mustard	49	51

	Original	Print
Testimony for Plaintiff in Rebuttal	50	52
Robert Harris Evans	50	52
Mrs. Berniece Hansen	51	53
Motion of Defendant to require Plaintiff to elect between Counts of Petition	52	54
Colloquy with Counsel with regard to Motion	52	54
Ruling on Motion	53	55
Motion of Defendant for Directed Verdict	54	55
Colloquy with Counsel with regard to Motion	57	57
Ruling on Motion	58	58
Court's Instructions to the Jury	59	59
Verdict	71	70
Judgment, January 15, 1957	72	70
Motion of Defendant for Judgment notwithstanding Verdict	73	71
Opinion of District Court on overruling of Motion of Defendant for Judgment notwithstanding Verdict	74	72
Order of District Court overruling Motion of Defendant for Judgment notwithstanding Verdict	76	73
Notice of Appeal	77	74
Order of District Court extending Time to file Record on Appeal	78	75
Relevant Docket Entries in United States District Court	79	75

	Original	Print
Record from U.S.D.C. for the Southern District of Iowa, Central Division	79	79
Memorandum and order overruling the plaintiff's motion to remand	79	79
Clerk's certificate	82	81
Proceedings in U.S.C.A. for the Eighth Circuit	83	82
Opinion, Van Oosterhout, J.	83	82
Dissenting opinion, Woodrough, J.	98a	96
Judgment	104	100
Petition for rehearing (omitted in printing)	105	101
Order denying petition for rehearing	129	101
Order staying issuance of mandate	131	101
Clerk's certificate (omitted in printing)	133	102
Order allowing certiorari	135	102

[fol. 1] (Stipulation of Counsel approving Record on Appeal, etc.)

In the United States Court of Appeals for the Eighth Circuit.

New England Mutual Life Insurance Company,
Appellant,
No. 15,740. vs. Civil.
Maxine K. Hinkle, Administratrix of the Estate of W. Max Hinkle, Deceased and Maxine K. Hinkle, Appellees.

It is hereby agreed by and between the parties hereto that the following record shall constitute and be the record on appeal to the United States Court of Appeals for the Eighth Circuit and it is further agreed that the United States District Court for the Southern District of Iowa, Central Division had jurisdiction of this cause, docketed in said Court as Civil Action 3-659, and that said case was properly removed by defendant from the District Court of the State of Iowa in and for Polk County to the United States District Court for the Southern District of Iowa, Central Division, and that the petition for removal was filed in said Court on November 8, 1955.

PHINEAS M. HENRY,

RALPH A. CHURCH,

LUTHER L. HILL, JR.,
Attorneys for Appellant.

L. S. FORREST,
Attorney for Appellees.

[fol. 2] Petition at Law.

(Filed in Polk County District Court, November 1, 1955
Filed in United States District Court in Petition for
Removal November 8, 1955)

In the District Court of the State of Iowa
In and for Polk County.

Maxine K. Hinkle, Administratrix of the Estate of W. Max Hinkle, Deceased, and Maxine K. Hinkle, Plaintiffs,
Law No. 65,540. vs.
New England Muaual Life Insurance Company, of Boston, Massachusetts, Defendant.

The Plaintiffs State:

That the Plaintiffs claim relief as prayed for herein alternatively arising out of the same transaction and the case presents questions of law and questions of fact common to both of them.

Count I.

The Plaintiff Administratrix for her cause of action states:

1. That she is the duly appointed, qualified and acting Administratrix of the Estate of W. Max Hinkle, Deceased.

2. That the Defendant is a corporation organized under the laws of Massachusetts and is authorized to do a life insurance business in the State of Iowa, and at the time hereinafter mentioned was engaged in soliciting life insurance in the State of Iowa.

3. That on the 25th day of February, 1955 the Defendant entered into and delivered to W. Max Hinkle a contract of life insurance in writing, in words and figures as follows:

Exhibit A.

"Conditional Receipt Do Not Destroy

Received Twenty-one and 70/100 Dollars in connection with an Application made this day to the New England

Mutual Life Insurance Company, of Boston, Massachusetts, for Insurance of $10,500 on the life of W. Max Hinkle Immediate Coverage.

[fol. 3] "The Insurance applied for shall be in full force and effect from this date, provided the Proposed Insured is now in good health, notwithstanding any change in the Proposed Insured's health or condition due to disease hereafter acquired or to any subsequent casualty; and provided that satisfactory evidence that the Proposed Insured is now insurable for the amount, plan and rating applied for is received at the Home Office of the Company in Boston; but if the Company determines that the Proposed Insured is not so insurable, said Application shall be declined and the amount paid will be refunded upon return of this receipt. If any check or draft be given in payment of this premium is not paid on presentation this receipt shall be of no effect. This receipt is not valid unless countersigned for the Company by a duly licensed agent.

Countersigned 2/25/1955
(signed) Philip C. Raye, Secretary
(silgned) Rodney Bliss, Jr.
General Agent.

"If you do not hear from the Company within sixty days, notify the Company at Boston, and upon request and return of this receipt the premium will be refunded."

4. That the above contract, Exhibit A, was prepared and printed by the Defendant, and that the parts that were not printed, especially the words "Immediate Coverage" were written in it with pen and ink by Defendant and it was countersigned by the General Agent of the Defendant.

5. That W. Max Hinkle died on February 26, 1955, and that thereafter Defendant repudiated said contract, did acts calculated to defeat its liability, denied liability and refused to abide by said contract, and thus did breach said contract.

6. That there is justly due the Plaintiff under the terms of said contract the sum of $10,500 with interest thereon

from February 26, 1955, and by reason of Defendant's said breach Plaintiff is damaged in said amount.

Wherefore, Plaintiff Administratrix prays for judgment against Defendant on Count I of this petition in the sum of $10,500 with interest thereon from February 26, 1955 and the costs of this action.

Count II.

The Plaintiff Administratrix for Count II of this petition states:

1. All the facts heretofore stated in Count I of this petition.

2. That W. Max Hinkle was in good and insurable health on said date the contract was made.

[fol. 4] 3. That all conditions precedent to be performed by W. Max Hinkle or this Plaintiff have been performed, except those excused by impossibility and those which the Defendant has prevented from being performed, or has waived.

4. That after the above named contract, Exhibit A, was entered into and delivered by Defendant's agent to W. Max Hinkle, the Defendant directed said Hinkle to take a physical examination before a physician named by Defendant and under Defendant's employ, and set the date for said examination for the following Monday, February 28, 1955 at the office of Defendant's doctor, and said Hinkle orally acquiesced in said direction to take said examination at the aforesaid time and place so named by Defendant's said agent.

5. That the Defendant company has never determined or claimed that the said Hinkle was not insurable, and has by its conduct waived that provision or condition of Exhibit A.

6. That the condition of taking the physical examination at the time and place fixed became impossible of performance by reason that said Hinkle was suddenly killed

on Saturday, February 26, by the crashing of his airplane, and at the time fixed for the examination he was dead, and that said condition was excused by such impossibility.

7. That any and all other conditions not mentioned in paragraphs 4 to 6 inclusive above, were prevented from occurring by the acts and willful conduct of the Defendant, or were waived by the Defendant.

8. That W. Max Hinkle is dead, and has been since the 26th day of February, 1955; and that the Defendant had immediate knowledge thereof; and breached the contract by denying liability, refused to pay the insurance, and did acts calculated to defeat liability and to create a defense.

9. That by reason of the defendant's breach and refusal to pay, ~~this~~ Plaintiff is damaged in the sum of $10,500 with interest thereon from the 26th day of February, 1955, and that there is justly due the Plaintiff under the terms of said contract the sum of $10,500, with interest thereon from February 26, 1955, no part of which has been paid.

Wherefore, this Administratrix Plaintiff prays for judgment against the Defendant in the sum of $10,500 with interest thereon from the 26th day of February, 1955, and the costs of this action.

[fol. 5] Count III.

The Plaintiff, Maxine K. Hinkle states:

1. The facts herein stated in paragraphs 2, 3, 4 and 5 of Count I of the petition.

2. ~~That the~~ Defendant has represented that this Plaintiff is the named beneficiary of the insurance and that thus this Plaintiff is uninformed whether this cause of action belongs to the Estate or to her personally, and thus sues in the alternative, and states on information that she is the named beneficiary.

3. That by reason of the Defendant's breach as aforesaid, this Plaintiff is damaged in the sum of $10,500 with interest thereon from the 26th day of February, 1955, and that there is justly due this Plaintiff from Defendant the sum of $10,500 together with interest from February 26, 1955, no part of which has been paid.

Wherefore, this Plaintiff prays in the alternative that this Plaintiff have judgment against the Defendant in the sum of $10,500, together with interest thereon from the 26th day of February, 1955, and the costs of this action.

Count IV.

The Plaintiff, Maxine K. Hinkle, for Count IV of this petition states:

1. All the facts stated in paragraphs 2, 3, 4, and 5 of Count I of this petition.

2. All the facts stated in paragraphs 2, 3, 4, 5, 6, 7, and 8 of Count II of this petition.

3. That Defendant has represented that this Plaintiff is the named beneficiary of the insurance, and upon this information she alleges that she is the beneficiary of the insurance herein.

4. That by reason of the Defendant's breach as aforesaid she is damaged in the sum of $10,500 together with interest thereon from the 26th day of February, 1955, and that said sum is justly due this Plaintiff, no part of which has been paid.

Wherefore, this Plaintiff prays judgment against the Defendant on Count IV of this petition in the sum of $10,500 together with interest thereon from the 26th day of February, 1955, and the costs of this action.

L. S. FORREST,
Attorney for Plaintiffs.
25 Law Building at Drake University.

[fol. 6]

Answer.

(Filed in United States District Court, December 5, 1955)

In the United States District Court for the Southern District of Iowa, Central Division.

Maxine K. Hinkle, Administratrix of the Estate of W. Max Hinkle, Deceased, and Maxine K. Hinkle, Plaintiffs,
No. 3-659. vs Civil Action.
New England Mutual Life Insurance Company of Boston, Massachusetts, Defendant.

For answer to the petition of the plaintiffs, defendant states as follows:

Answer to Count I.

First Defense.

1. It admits paragraph 1 on information and belief.

2. It admits paragraph 2.

3. Answering paragraph 3 it admits that Rodney Bliss, Jr., general agent of the defendant in Des Moines, Iowa, signed and delivered to W. Max Hinkle a conditional receipt as referred to in said paragraph but denies that the same was a contract of life insurance. A true and correct photostatic copy of said conditional receipt showing what was printed and what was in writing is attached hereto and made a part hereof and marked Exhibit 1.

4. Answering paragraph 4 it admits that the printed form of conditional receipt was prepared and printed by it and states that the written words and figures, to-wit: "Twenty-one and 70/100", "$10,500", "Immediate coverage" and the date and signature, "Rodney Bliss, Jr., General", were written by the said Rodney Bliss, Jr.; it denies that said receipt was a contract of insurance.

[fol. 7] 5. Answering paragraph 5 it admits on information and belief that W. Max Hinkle died on February 26, 1955, and that it denied any liability under said conditional receipt, but denies the remainder of said paragraph and alleges that there was no contract of insurance between the defendant and W. Max Hinkle.

6. It denies paragraph 6.

Second Defense.

For further and separate defense to Count I it repeats the allegations of the First Defense above and states as follows:

1. That at the time of the delivery of the conditional receipt referred to above and as a part of the same transac-

tion the said W. Max Hinkle executed Part I of an application to the defendant for insurance on his life and that a copy of said application is attached hereto and made a part hereof and marked Exhibit 2.

2. That the said W. Max Hinkle told Rodney Bliss, Jr., the general agent of the defendant who obtained said application, that he wished to apply for a decreasing term policy for a period of twenty years for the purpose of providing funds to pay off a mortgage on his home in Des Moines, Iowa, which mortgage was payable in instalments and he informed the said Rodney Bliss, Jr., that he wanted a policy with an initial death benefit in the sum of $10,500 and he gave the said Rodney Bliss, Jr. a check in the sum of $21.70 payable to New England Mutual Life Insurance Company which was the amount of the first quarterly premium on the policy applied for.

3. That Part I of said application contains the agreement: "It is hereby agreed that this application, including Part II, a copy of which is to be attached to the policy when issued, shall become a part of every policy issued hereon."

[fol. 8] 4. That the original of said Part I was delivered to an attorney representing the plaintiff at his request shortly after the death of W. Max Hinkle, and it alleges on information and belief that said Part I is now in the possession of the plaintiff and her attorney.

5. That Part II consists of statements made by the proposed insured to the medical examiner as to his previous condition of health and the report of the medical examiner upon a physical examination of the proposed insured.

6. That on the date of the execution of Part I and delivery of the receipt referred to, the said Rodney Bliss, Jr. arranged with Dr. E. R. Posner, Des Moines, Iowa, as medical examiner for the defendant, to give W. Max Hinkle a medical examination at 11:45 A.M. on the same date but that the said W. Max Hinkle, after said appointment had been made, told Rodney Bliss, Jr. that he would be too busy to take the same and would take it on the following Monday, February 28, and an appointment was made for that date.

7. That the said W. Max Hinkle died on February 26, 1955, and that his death resulted from travel or flight in an aircraft of which he was acting as pilot and which was owned by him.

8. That the said Part II was never completed by W. Max Hinkle and no complete application was ever made to the defendant for life insurance on his life and that no contract of insurance, temporary or permanent, was entered into between the said W. Max Hinkle and the defendant.

9. That the conditional receipt, Exhibit I, provides that the insurance applied for shall be in full force and effect from the date thereof "provided that satisfactory evidence that the Proposed Insured is now insurable for the amount, plan and rating applied for is received at the Home Office of the Company in Boston," and because of the failure of the said W. Max Hinkle to take the medical examination, no such satisfactory evidence has ever been received at the Home Office of the defendant in Boston and the insurance applied for never went into effect.

[fol. 9] 10. That at the time of the execution of the conditional receipt referred to above, the said W. Max Hinkle, delivered to the said Rodney Bliss, Jr. a check for $21.70 payable to the order of New England Mutual Life Insurance Company; that said check was never cashed or deposited to the account of the defendant; that shortly after the death of W. Max Hinkle the said Rodney Bliss, Jr. was notified by Mr. Ray Nyemaster, an attorney representing the plaintiff that he was investigating the liability of the defendant company and that he would hear from him further; that the said Rodney Bliss, Jr. notified Mr. Nyemaster at that time that the application for insurance on the life of W. Max Hinkle had never been completed because of the failure of W. Max Hinkle to take a physical examination and that no insurance on his life was in force; that he heard nothing further from him until May 19, 1955, when other attorneys associated with Mr. Nyemaster notified him that they were taking no action in the matter; that on May 19, 1955, he mailed said check to the plaintiff; that the attorney for the

plaintiff in this action returned said check to him by mail on June 13, 1955; that said original check is in the possession of the defendant's attorneys and the defendant has been at all times and is now ready and willing to deliver the same to he plaintiff and that it hereby offers and tenders the same to the plaintiff.

Third Defense.

For further and separate defense to Count I the defendant repeats the allegations of its First Defense and states as follows:

1. That the policy applied for was a decreasing term policy providing decreasing term insurance for a term of 20 years and for an initial amount of insurance during the first year in the sum of $10,500, which amount would decrease each year thereafter in the sum of $500, the purpose of said insurance being to provide funds for the payment of a mortgage on the home of the said W. Max Hinkle in Des Moines, Iowa, which mortgage was payable in installments.

[fol. 10] 2. That the printed form of the conditional receipt, Exhibit 1, contained no space for a description of said policy other than the face amount thereof and in order to make it clear that said policy would not always be in the amount of $10,500, but would be in a decreasing amount, the said Rodney Bliss, Jr., wrote the words "Immediate Coverage" under the figure "$10,500" in said receipt to show that the initial amount of insurance for the first year would be in the sum of $10,500.

3. That the said Rodney Bliss, Jr. had no power or authority on behalf of the defendant to make or alter contracts of insurance or to alter the terms of said [conditonal] receipt and if the words "Immediate Coverage" are construed to be an agreement on the part of the said Rodney Bliss, Jr. that the insurance applied for would take effect immediately upon delivery of said receipt, said agreement was not authorized by the defendant and was not ratified by the defendant and is not binding upon the defendant.

Fourth Defense.

For further and separate defense to Count I, the defendant repeats the allegations of its First Defense and states as follows:

1. That at the time of the delivery of the [conditonal] receipt referred to above and as a part of the same transaction the said W. Max Hinkle executed Part I of an application to the defendant for insurance on his life and a copy of said application is attached hereto and made a part hereof and marked Exhibit 2.

2. That in answer to Question 17A of said application, "Does the proposed insured plan to make flights as a trainee, pilot or crew member or has he made such flights within 10 years?" the said W. Max Hinkle gave the answer "No."

[fol. 11] 3. That said application was signed by the said W. Max Hinkle after the answer "No" had been written thereon in answer to Question 17A and that said application contains the following statement over his signature: "The foregoing information is true and complete and is correctly recorded."

4. That in truth and in fact the said W. Max Hinkle was a licensed aeroplane pilot and owned his own plane and had made many flights within 10 years previous to the date of said application, the exact number of which is not known at this time by the defendant, and planned to make further flights in the future and in fact planned to make a flight the following day to Omaha, Nebraska.

5. That if the true facts had been stated in answer to said question the policy applied for would not have been issued for the amount, plan and rating applied for and that even if the transaction between the said W. Max Hinkle and Rodney Bliss, Jr. was a contract for temporary insurance, which the defendant denies, the said contract was conditional and subject to the provisions of the conditional receipt referred to and the insurance applied for never took effect because the said W. Max Hinkle was not insurable

for the amount, plan and rating applied for under the rules of the defendant company on account of his aviation record.

6. That because of his aviation record, the said W. Max Hinkle could not furnish satisfactory evidence that he was on February 25, 1955, insurable for the amount, plan and rating applied for, and because of said fact the insurance applied for never went into force and effect.

Fifth Defense.

For further and separate defense to Count I it repeats the allegations of its First Defense above and states as follows:

[fol. 12] 1. That Section 508.28 of the Code of Iowa, 1954, prohibits the defendant from issuing a policy of life insurance in the amount of $10,500 until a medical examination has been passed by the applicant and by reason of said statute the said W. Max Hinkle was bound to know that the defendant would not insure his life without such examination.

2. That at the time of the execution of Part I of the application, a copy of which is marked Exhibit 2, and at the time of the delivery of the conditional receipt, Exhibit 1, the said W. Max Hinkle was orally notified by Rodney Bliss, Jr., the general agent of the defendant, that a medical examination was necessary.

3. That the failure of W. Max Hinkle to take the medical examination was due to no act of the defendant but was due solely to the refusal of the said W. Max Hinkle to take said medical examination on the date that he completed Part I of the application.

4. That because of the failure of the said W. Max Hinkle to take said medical examination, the application for said policy was never completed and the said W. Max Hinkle knew that he had not completed an application of life insurance pursuant to which a policy could be issued to him under the laws of the state of Iowa.

Sixth Defense.

For further and separate defense to Count I the defendant repeats the allegations of its First Defense and states as follows:

1. That at the time of delivery of the conditional receipt referred to above and as a part of the same transaction the said W. Max Hinkle executed Part I of an application to the defendant for insurance on his life and that a copy of said application is attached hereto made a part hereof and marked Exhibit 2.

2. That in said application, the plaintiff, Maxine K. Hinkle was designated by the said W. Max Hinkle as the beneficiary to be named in said policy and if the plaintiff [fol. 13] has any right of action against the defendant on account of the facts stated in the petition, which the defendant denies, the said right of action is in her individually and not as administratrix of the estate of W. Max Hinkle, deceased.

Answer to Count II.

First Defense.

1. Answering paragraph 1 it repeats the allegations of its First Defense in answer to Count I.

2. Answering paragraph 2 it has neither knowledge or information sufficient to form a belief as to the health of the said W. Max Hinkle and therefore denies the allegations of said paragraph.

3. It denies paragraph 3.

4. Answering paragraph 4 it admits that at the time the said conditional receipt was delivered to W. Max Hinkle, the said Rodney Bliss, Jr., requested the said W. Max Hinkle to have a physical examination by Dr. E. R. Posner, a medical examiner for the defendant, and secured an appointment for said examination in his office at 11:45 on the same date and that upon the request of the said W. Max Hinkle the said appointment was postponed until Monday, February 28, 1955, and because of the death of the said W. Max Hinkle on February 26, 1955, no physical examination was ever taken by him.

5. It denies paragraph 5.

6. Answering paragraph 6 it admits that it was impossible for W. Max Hinkle to take a physical examination on February 28, 1955, but denies that it was impossible for the said W. Max Hinkle to take said examination after the delivery of Exhibit 1 and prior to his death and denies that the taking of the physical examination was excused.

7. It denies paragraph 7.

[fol. 14] 8. In answer to paragraph 8 it admits that W. Max Hinkle died on February 26, 1955, and admits that Rodney Bliss, Jr., general agent of the defendant, was informed of his death on said date and admits that it has refused to pay any insurance on his life but denies that there was any contract for insurance and denies the remaining allegations of said paragraph.

9. It denies paragraph 9.

Second Defense.

For further and separate defense to Count II it repeats the allegations of its Second Defense in answer to Count I above.

Third Defense.

For further and separate defense to Count II it repeats the allegations of its Third Defense in its answer to Count I above.

Fourth Defense.

For further and separate defense to Count II it repeats the allegations of its Fourth Defense in its answer to Count I above.

Fifth Defense.

For further and separate defense to Count II it repeats the allegations of its Fifth Defense in its answer to Count I above.

Sixth Defense.

For further and separate defense to Count II it repeats the allegations of its Sixth Defense in its answer to Count I above.

Answer to Count III.

First Defense.

1. For answer to paragraph 1, it repeats the allegations of paragraphs 2, 3, 4, and 5 of the First Defense in its answer to Count I above.

[fol. 15] 2. For answer to paragraph 2 it admits that the plaintiff in her individual capacity was named as the beneficiary in Part I of the application dated February 25, 1955, referred to herein as Exhibit 2, but denies the allegations of said paragraph as to insurance.

3. It denies paragraph 3.

Second Defense.

For further and separate defense to Count III, it repeats the allegations of its Second Defense in its answer to Count I above.

Third Defense.

For further and separate defense to Count III, it repeats the allegations of its Third Defense in its answer to Count I above.

Fourth Defense.

For further and separate defense to Count III, it repeats the allegations of its Fourth Defense in its answer to Count I above.

Fifth Defense.

For further and separate defense to Count III, it repeats the allegations of its Fifth Defense in its answer to Count I above.

Answer to Count IV.

First Defense.

1. For answer to paragraph 1, it repeats the allegations of paragraphs 2, 3, 4, and 5 of its First Defense in its answer to Count I above.

2. For answer to paragraph 2, it repeats the allegations of paragraphs 2 to 8 inclusive of its First Defense in its answer to Count II above.

3. Answering paragraph 3, it admits that the plaintiff in her individual capacity was named as the beneficiary in Part I of the application dated February 25, 1955, referred to herein as Exhibit I, but denies the allegations of said paragraph as to insurance.

[fol. 16] 4. It denies paragraph 4.

Second Defense.

For further and separate defense to Count IV, it repeats the allegations of its Second Defense in its answer to Count I above.

Third Defense.

For further and separate defense to Count IV, it repeats the allegations of its Third Defense in its answer to Count I above.

Fourth Defense.

For further and separate defense to Count IV, it repeats the allegations of its Fourth Defense in its answer to Count I above.

Fifth Defense.

For further and separate defense to Count IV, it repeats the allegations of its Fifth Defense in its answer to Count I above.

Wherefore it prays that the petition be dismissed.

PHINEAS M. HENRY,

RALPH A. CHURCH,

LUTHER L. HILL, JR.,
Attorneys for Defendant,
1111 Equitable Building,
Des Moines 9, Iowa.

CONDITIONAL RECEIPT. DO NOT DESTROY.

RECEIVED Twenty One and 79/100 Dollars in connection with an
(Insert amount of cash or check)

Application made this day to the New England Mutual Life Insurance Company, of Boston, Massachusetts,

for Insurance of $ 10,500 on the life of W. Mark Hinkle
Insured's Name

The Insurance applied for shall be in full force and effect from this date, provided the Proposed Insured is now in good health, notwithstanding any change in the Proposed Insured's health or condition due to disease hereafter acquired or to any subsequent casualty; and provided that satisfactory evidence that the Proposed Insured is now insurable for the amount, plan and rating applied for is received at the Home Office of the Company in Boston; but if the Company determines that the Proposed Insured is not so insurable, said Application shall be declined and the amount paid will be refunded upon return of this receipt. If any check or draft given in payment of this premium is not paid on presentation, this receipt shall be of no effect. This receipt is not valid unless countersigned for the Company by a duly licensed agent.

Countersigned 2/25, 1955

Barbara Blevins Agent

Philip C Rayle Secretary

If you do not hear from the Company within sixty days, notify the Company at Boston, and upon request and return of this receipt the premium will be refunded.

EXHIBIT 1.

(p. 19)

EXHIBIT 2.

USE BLACK INK—WRITE LEGIBLY

Rodney Bliss, Jr.

(Print Name of Agent entitled to credit for this Application)

Agency Contract or Brokers Contract ☐

Persistency ☒ Supplementary Persistency ☐

R. Bliss, Jr. D
3-9-D
1/10/57

RODNEY BLISS, JR., General Agent
1010 Fleming Building
S. W. Cor. Sixth Avenue and
Walnut Street
DES MOINES 9, IOWA

The First Mutual Life Insurance Company Chartered in America

Part I—Application to the New England Mutual Life Insurance Company

For Insurance on the Life of W. Mary Hinkle

(Print names clearly as it should appear in the Policy)

1 Residence Address (Give No., Street, City, Zone No. and State) 4011 Grand Ave Des Moines 13, Ia.

2 Business Address (Give No., Street, City, Zone No. and State)

3 To whom and where are premium notices to be sent? Insured at Residence

(If Insured, give address; if other than Insured, give name and address)

4 Place of Birth (City or Town) Gilbert (State or Country) Ia.

5 Citizen of U. S. A.

6 Date of Birth (Month) Feb. (Day) 1 (Year) 12

7 Age nearest Birthday 42

8 Sex M

9 Single, married, widowed or divorced Married

10 Occupation (Be explicit) Secretary & Treasurer

11 Any change contemplated?

12 Employer D. W. Onthank Co.

13 Nature of Business

14 Insurance in force on life of Proposed Insured (If space inadequate, send memorandum)

Company	Year of Issue	Amount	Double Indemnity
Connecticut Mut	1954	3000	Incl.
National Service Life	5000	1942	

(If any of the above insurance is business insurance, so indicate.)

15 What other negotiations for life or disability insurance on the life of the Proposed Insured are pending or contemplated? (State fully.) None

16 In what countries outside the United States does the Proposed Insured intend to travel or reside? None

If going to make flights as a trainee, pilot or crew member,

Waiver of Premiums ☐
Double Indemnity ☐

18 Form of Insurance

19 Amount

20 Any special request

21 To whom payable (Give full name. If a Money or if Life Insurance is involved give date of birth. If a Corporation, name of State of Incorporation. Full names of all persons.)

Josephine B. Hinkle of 4011 Grand Ave Des Moines 13, Ia. surviving Children in equal shares

22 Relationship Wife of Insured

23 Is the right to change the beneficiary reserved in the Proposed Insurance? Yes

If not, to whom are ownership and control reserved? All rights to Insured

24 Apply Dividends under Option ____
(A Pay in cash; B Apply to reduce premiums; C Use to purchase paid-up additions; D Accumulate at interest.)
(Option C is not applicable to Term Policies or during term period of other policies.)

25 Is Automatic Premium Loan Provision elected, if available under the form of insurance applied for? ---

26 First Premium: Amount ☐
Semi-annual ☐☐
Quarterly ☐
(Check one.)

27 $ ____ paid agent on ____ (Date)
for first premium on insurance applied for.
(Settlement acceptable only on one of Company regular forms of payment plans)

Reserve for HOME OFFICE USE, for ADDITIONS and AMENDMENTS

No change shall be made as to Classification, Form of Insurance, Amount, or Benefits, unless agreed to in writing by me.

Chartered 1835

Chartered 1835

Chartered 1835

4 Place of Birth (City or Town) Gilbert (State or Country) S. | 5 Citizen of U.S.A.

6 Date of Birth (Month) Feb. (Day) 1 (Year) | 7 Age nearest Birthday 42 | 8 Sex M | 9 Single, married, widowed or divorced Married

10 Occupation (Be explicit) Insurance - Forest Engineer | 11 Any change contemplated?

12 Employer U. S. Smelting Co. | 13 Nature of Business

14 Insurance in force on life of Proposed Insured (If none inadequate, send memorandum)

Company	Year of Issue	Amount	Double Indemnity
Connecticut Mut	1954	3000	Accidental Death
National Service Life	1952	1000	

(If any of the above insurance is business insurance, so indicate.)

15 What other negotiations for life or disability insurance on the life of the Proposed Insured are pending or contemplated? (Specify.) None

16 In what countries outside the United States does the Proposed Insured intend to travel or reside? None

17 A Does the Proposed Insured plan to make flights as a student, pilot or crew member, or has he made such flights within 10 years? No

B Has flying time as a fare-paying passenger on scheduled airlines exceeded 100 hours in any of the last five years, or is it expected that it will exceed this figure in the next 12 months? No

C Has flying time as a passenger, other than as a fare-paying passenger on scheduled airlines, exceeded 25 hours in any of the last five years, or is it expected that it will exceed this figure in the next 12 months? No
(If answer to A, B or C is "Yes," complete Aviation Questionnaire.)

22 Relationship Employer - employee

23 Is the right to change the Beneficiary reserved in the Proposed Insurance? Yes
If not, so whom are ownership and interest reserved? [illegible] to husband insured

24 Apply Dividends under Option _____
(A Pay in cash; B Apply on reduce premiums; C Use to purchase paid-up additions; D Accumulate at interest.)
(Option C is not applicable to Term Policies or during term period of other policies.)

25 Is Automatic Premium Loan Provision elected, if available under the form of insurance applied for? —

26 First Premium: Annual ☐ Semi-annual ☐ Quarterly ☐ (Check one.)

27 $_____ paid herewith on _____ (Date) for first premium on insurance applied for. (Settlement acceptable only on one of Company regular forms of payment plans)

Reserve for HOME OFFICE USE, for ADDITIONS and AMENDMENTS

No change shall be made as to Classification, Form of Insurance, Amount, or Benefits, unless agreed to in writing by me.

It is Hereby Agreed that this Application, including Part II, a copy of which shall be attached to the Policy when issued, shall become a part of every Policy issued hereon; that acceptance of a Policy shall constitute ratification of any and all changes noted by the Company under "Additions and Amendments"; and that the insurance applied for shall take effect only if and when (a) this Application is approved by the Company at its Home Office, and (b) the first premium is paid while the Proposed Insured is in good health, provided there is then no change in the insurability of the Proposed Insured since the date hereof. If, however, the first premium is paid with this Application, and it is so stated in answer to Question 27, the insurance shall take effect as stipulated in the Conditional Receipt. The foregoing information is true and complete and is correctly recorded.

Witness _____ Date 2/25/1955 Wilmax Hinkle (Sign name in full) Proposed Insured.

Witness _____ Date _____ 19__ _____ (Sign name in full) Applicant for Insurance.

(Only one signature required if Proposed Insured and Applicant for Insurance are the same)

References

DO NOT WRITE BELOW THIS LINE EXCEPT AS INDICATED

Name	Address	

Chartered 1835

(p. 20)

Agent's Certificate

To be filled out and signed by the Agent or Broker

1. How long have you known the Proposed Insured?_____

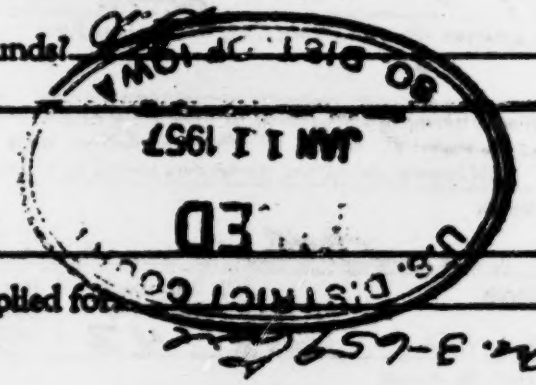
2. If Proposed Insured resides in the country: _____ miles in a _____ direction from _____ on _____ Road or Route.

3. If Proposed Insured changed his residence or business address within two years, give the last previous address and employer.
Resided at 3919 5th St. Seattle Wash. 1954:

4. If name of Proposed Insured has been changed within ten years by marriage or otherwise, give previous name.

5. Occupation. Give comprehensive description. (Use Occupation Blank freely as circumstances make advisable.)

6. Are premiums to be paid by a corporation, or from trust, guardianship or estate funds?_____
If so, are you submitting the required evidence of authority?_____



7. If Proposed Insured is a minor or a married woman:
   (a) Give full name and address of father or husband._____
   (b) If a minor, give names of brothers and sisters for whom insurance is being applied for._____
   (c) Who is paying for this insurance?_____
   (d) How much insurance is in force or applied for on life of father or husband? (If none, give reason.)

8. If Beneficiary is not a relative, nor a business partner or associate, explain fully the insurable interest.

9. If this is business insurance, give names of other business associates for whom insurance is being applied for._____

10. What is your estimate of Proposed Insured's financial worth? $_____ earned income? $_____
total income? $_____

11. Is the proposed insurance intended to replace any now carried in this or any other Company? (If so, state reasons and indicate Companies and form of insurance; if this Company, also give policy numbers and agency.)_____

12. Do you unqualifiedly recommend approval of the Application?_____

_____ 19____

_____
Agent
Broker

6. If Proposed Insured is a Minor or a Married Woman:

(a) Give full name and address of father or husband

(b) If a minor, give names of brothers and sisters for whom insurance is being applied for

(c) Who is paying for this insurance?

(d) How much insurance is in force or applied for on life of father or husband? (If none, give reason.)

8. If Beneficiary is not a relative, nor a business partner or associate, explain fully the insurable interest.

9. If this is business insurance, give names of other business associates for whom insurance is being applied for.

10. What is your estimate of Proposed Insured's financial worth? $ earned income? $ total income? $

11. Is the proposed insurance intended to replace any now carried in this or any other Company? (If so, state reasons and indicate Companies and form of insurance; if this Company, also give policy numbers and agency.)

12. Do you unqualifiedly recommend approval of the Application?

19 Agent

Check over every part of this Application before you send it to the Company. See that the Application and the Medical Report are clear, correct and complete.
Additional information regarding finances, purpose of insurance, dates of lapse and plans of other insurance, and other special items, are desirable and will help to avoid delay when a large amount of insurance is applied for or carried.

The attached slip indicating source of business must be completed.

General Agent's Certificate

1. What is this Agent's status? Full-time ✓ Part-time Agent of another Company Broker

2. Is the Agent licensed where this Application is written: for this Company? Yes for another Company?

as Broker?

19 55 Robert Bliss, Jr., General Agent

Instructions

1. Unless otherwise requested, credit for this business will be given to the person named above Part I. See that the correct name appears. If a firm, give also name of individual soliciting. The name credited in your monthly analysis of new business must coincide.
2. If the premium is paid on the date this Application is signed, the Policy will usually bear that date, if issued as applied for.
3. This Application is the property of the Company, to whom it must be returned after the medical examination is made and this application completed. It must not be withdrawn or destroyed.

[fol. 17] Reply.

(Filed in United States District Court, December 10, 1955)

(Title of Case)

Division I.

The Plaintiffs state that under the Iowa Rules of Civil Procedure new matter in an Answer stands admitted unless pleaded to by way of a Reply within seven days after the Answer is filed, and that there is no procedure in said Iowa Rules for pleading in case a cause is remanded by a Federal Court, and these Plaintiffs fear that should this case be remanded it would then be too late to file a Reply. And the Plaintiffs further state that under the Iowa law an estoppel cannot be relied upon unless specially pleaded, and Plaintiffs are not sufficiently informed as to whether such is substantive law of Iowa or is procedure law, and they fear that the Defendant will claim in this Court that such is substantive law of the state and thus exclude the Plaintiffs on all questions of estoppel, and because of both of the reasons above, and out of the abundance of precaution, these Plaintiffs file this as the separate Reply of each of them.

Division II.

Each Plaintiff separately states as her Reply to Defendant's Second Defense:

1. They deny paragraph 2.

2. As to paragraph 6, they deny that the date for medical examination was set at the request of Max Hinkle, and they state that the date of the examination was fixed [fol. 18] by agents of the Defendant for the Monday following the date of the contract, Exhibit A, and was not fixed for said date by any request of said Max Hinkle.

3. They further state that Monday, February 28, was fixed by all parties in the contract, more especially the Defendant.

4. That the interpretation Defendant put upon the clause in Exhibit A for "satisfactory evidence that pro-

posed insured is now insurable", etc., was that said clause meant a physical examination arranged by the Defendant. That Defendant arranged it for Monday, February 28.

Division III.

Each Plaintiff separately states as her Reply to the Third Defense pleaded by Defendants:

1. They deny paragraph 1 of said Third Defense.

2. That said paragraph 1 is an attempt to violate the Iowa law known as the parole evidence rule, and that such rule in Iowa is a rule of substantive law, and that the substantive law of Iowa precludes Defendants from varying the terms of the valid written contract sued upon and set out in the Petition.

3. That the contract sued upon was made and entered into in the State of Iowa.

4. That Defendant is estopped from asserting the facts stated in paragraph 3 of said Third Defense, because:

a. It permitted its agent Bliss to enter into said writing and caused the said Hinkle to believe, to the time of his death, that he was covered by this insurance as stated in the receipt issued.

b. In all of its dealings with the various attorneys mentioned in their Answer, said paragraph 3 is the first time the Defendant has ever asserted or claimed that its agent had no such authority, and is estopped from so claiming at this late date.

c. It ratified it by not asserting it as soon as it discovered what Bliss had done, and waived it by not asserting it at its earliest opportunity in dealing with and correspondence with Plaintiff.

Division IV.

Each Plaintiff states as her Reply to the Fourth Defense set out in the Answer:

1. They deny paragraph 1, and state that Max Hinkle signed a blank furnished by Defendant similar to that set

out as Defendant's Exhibit 2, but that if Exhibit 2 is the same paper he signed, the Defendant has altered the same and has made additions to it after the agent Bliss left Max Hinkle's presence and after said Hinkle signed it, and they deny that the answers shown on Exhibit 2 as Nos. 15, 16, and 17 were on said Exhibit at the time Max Hinkle signed it.

2. They deny the facts stated in paragraph 2.

[fol. 19] 3. They deny the facts stated in paragraph 3.

4. a. The Plaintiffs further state that Defendant is estopped from setting up as a defense the matters stated in their Fourth Defense and from using as against these Defendants any part of Exhibit 2, and from claiming that said Exhibit 2 is any part of the contract entered into, because they did not furnish or deliver to Max Hinkle any copy of said Exhibit 2, and that by the substantive law of Iowa an application is not a part of the insurance contract, and the insurance company is estopped from claiming that it is, unless they attach a copy thereof to the contract they deliver to the insured, and that the purpose of said Iowa law is to make it impossible for the insurance company to alter or add to such application after they learn of the death of the insured, and that the failure to attach and deliver to Max Hinkle a copy of said Exhibit 2 has led to detriment in this case, and that if they had delivered a copy it would then have been impossible to alter the original without positive detection; and by their failure to give him a copy of what he signed they have opened the door to all the detriment that has arisen in this case, and are thus estopped from using that instrument, Exhibit 2, when they had reserved to themselves that power to alter without positive detection.

b. and that regardless of estoppel, under the Iowa law an application for insurance is not a part of the contract unless the insurance company furnished the insured a copy of it attached to the contract.

c. That Defendants waived the defense pleaded as the Fourth Defense, by their conduct after they discovered the

facts they allege, and especially by paragraph 10 of their Second Defense.

5. Plaintiffs deny paragraph 5.

6. Plaintiffs deny paragraph 6.

Division V.

Each Plaintiff states as her separate Reply to the Fifth Defense set out in the Answer:

1. They deny that under the laws of Iowa section 508.28 Iowa Code means what Defendants assert in paragraph 1.

2. That if said section should mean what Defendants assert in their Answer, Defendants are estopped to rely thereon because of the following facts:

a. They have been engaged in the insurance business in Iowa since 1913, and Max Hinkle was inexperienced in the insurance business, and with a knowledge of the law they now claim they wilfully violated said law, and are estopped from claiming the benefit of their own wrong, and they printed on said receipt that the insurance was then in force, "irrespective of any subsequent casualty," they thus led Max Hinkle into the belief that he was covered by insurance and they caused him to continue under such belief and lured him into a sense of security until his death and until it was too late for him to protect himself.

[fol. 20] b. That for years prior to the date of this transaction Defendants have used in Iowa the blanks containing the words printed on Exhibit A and have interpreted it in connection with the laws of Iowa to mean that the insurance is effective as of the date of the application and when they issue the policies they so date them and word them so that the premium is payable as of the date of the application, not of the physical examination, and that if Defendants had issued a policy after an examination in this instance, they would have followed their usual practice and would have so worded the policy to collect a premium covering the period between the application and the physical examination,

and that it has been Defendants' habit in Iowa to so interpret such "Conditional Receipts" as to entitle them to make the annual premium due as of the date of the application, not the date of the examination, and Plaintiffs state that because of such interpretation of such contracts by Defendants and their acts of charging a premium during the period between the application date and the physical examination date, Defendants are now estopped to assert that the Iowa law means what they plead in this Answer that it means.

c. That if the said Iowa Code does mean what Defendants plead that it does, Defendants are estopped by the acts aforesaid from relying upon such law in that by their conduct aforesaid, if not estopped, the Court would enable them to charge a premium and claim the insurance was in force between the application date and the examination date, if the applicant lived, and to claim he had no insurance, if he was killed before the examination.

d. They have made a habit to collect for insurance after they find he lived, and thus did not need it for the intervening period, thus when events happen so that he did need insurance during the intervening period, they are estopped to claim he did not yet have it.

e. That Defendants prepared the blank forms such as Exhibit A, and wilfully so worded them that they can blow both hot and cold, that if the applicant lives and takes the examination they charge him a premium from the date of the application after they know he did not die in the meantime, but if he is killed in the meantime, they can deny the insurance ever existed, and they should be estopped from carrying out this wilful scheme in the instance where the insured gets killed and does need the insurance covering the intervening period. They are estopped from interpreting a contract to mean that if he lives and does not need the insurance for the few days, he has to pay for it, but if he is killed and thus does need it, he has not got it.

f. That Defendant and all other insurance companies have procured opinions of Courts on similar statutes as see-

tion 508.28, and when it comes to charging premiums from the date of the application, have contended: that the contract of insurance is valid when it contemplates an examination; that the validity of a contract is determined from the facts existing when it is made, not by what happens after- [fol. 21] wards, and if a contract contemplates an examination section 508.28 is complied with. That in contract law a contract valid when made is not rendered invalid by subsequent events which make performance of a condition impossible. Impossibility of performance of a condition in an aleatory contract, or in any contract where the condition is not the bargained for exchange, excuses the performance of the condition.

g. That Defendant is estopped to rely upon what it states in paragraph 1 as to its interpretation of the Statute of Iowa, for to reach the conclusion Defendant pleads, the following would be the process:

That a contract of insurance that contemplates an examination is void until after the physical examination, yet they can charge a premium for the insurance that the insured did not have over the period prior to the examination. The custom of charging premiums for that period is an admission, and an estoppel to deny, that that contract was a valid contract from the beginning.

h. Their interpretation pleaded is further in conflict with the general law of Iowa on the subject of contracts, namely, that the validity of a contract is determined from the date it is made, not by what inadvertently happens afterwards, and it is not the law of Iowa that when a man has a valid contract, and is later accidently killed, his accident dates back and makes his existing contract void. And Defendant should be estopped from placing such an estimate on the intelligence of the Courts of Iowa. Accidental death does not date back and make existing contracts of the victim void.

i. That section 508.28 does not make the policy void, is not Contract Law of Iowa, but a direction as to conduct of insurance companies, and a company that violates the conduct prescribed for it is not in a position to claim advantage

of its own wrong, and is estopped from setting up its own wrong as a defense. If the statute means what Defendants plead, Defendant wilfully violated the statute in issuing the contract, Exhibit A, and cannot now defeat that contract by pleading its own wrong.

3. They deny paragraph 3.

4. They deny paragraph 4.

Division VI.

Each Plaintiff separately states as her Reply to the Sixth Defense in the Answer:

1. To each repeated allegation in the Answer, and to allegation there by reference to prior parts of the Answer, the Plaintiffs state the same facts as herein stated with respect to the allegation where it first appeared in the Answer.

2. They deny that Max Hinkle executed Exhibit 2 as it appears in the Answer, and state that Defendants altered it after it was signed.

[fol. 22] 3. That Defendants are estopped from claiming any advantage to themselves as to Exhibit 2 for all the reasons heretofore pleaded, and that Defendants did not leave Max Hinkle a copy of Exhibit 2, and for said reason it was no part of the contract, and Defendants are estopped to so claim.

Each Plaintiff for her separate Reply to First Defense to Answer of Count II states:

1. To each fact stated in the Answer by way of reference the Plaintiffs state the facts applicable thereto heretofore stated herein.

2. As to paragraph 2, Plaintiffs state that the condition pleaded thereto in the Answer has been waived by the Defendants.

3. They deny paragraph 4, and state that the examination was set for Monday, February 28, at the request of an

agent of the Defendant; and that said date was fixed by the Defendants.

4. Answering paragraph 6, Plaintiffs state that it was impossible to take the physical examination on the date fixed by the Defendants, to-wit, February 28, 1955, by reason of the accidental death by crashing of his airplane of Max Hinkle, and as to the conclusion of law pleaded in paragraph 6, Plaintiffs state that in Iowa, as universally, impossibility of performance of a condition precedent at the time agreed for its performance, where the condition is not the bargained for exchange for the contract excuses the performance of the condition and makes its performance unnecessary, and creates liability irrespective of its performance. And Plaintiffs state that this contract was an alieatory contract, and in such contracts the insurance company is bargaining for the premium, not to get physical examinations taken.

Division VII.

As to the remaining divisions or numbered defenses in the Answer each Plaintiff separately states:

1. That each one is pleaded by Defendants by reference to some other part of the Answer, and as to each of such, Plaintiffs state the same facts as heretofore stated herein in Reply to the part of the Answer where it first appeared.

L. S. FORREST,
Attorney for Plaintiffs,
25 Law Building
at Drake University.

[fol. 23] Abstract of Evidence.

The case came on for trial before United States District Judge Albert L. Reeves and a jury on January 10, 1957, and the following proceedings were had:

Plaintiff's Evidence.

MAXINE K. HINKLE.

I was the wife of W. Max Hinkle and have lived in Des Moines four or five years. He was employed by G. W. Onthank Company as service manager.

I first saw Exhibit 1, on February 26, 1955, on the kitchen table. Mr. Hinkle left about 4 o'clock in the morning and I got up about 7 o'clock. He had gone out to the airport and was planning to go in his own plane to a meeting of the Marine Reserves in Lincoln, Nebraska. It was a regular trip every month and he always went by his own plane. About 8 o'clock my neighbors came and told me of his death.

About two weeks after the funeral Mr. Bliss called me. He said they wouldn't pay because he had not had a physical examination. I am the administratrix of W. Max Hinkle's estate.

Mr. Forrest: The plaintiff offers in Evidence Exhibit 1.

The Court: Received.

(Note. This is the conditional receipt set out as Exhibit A in the petition a photostatic copy of which appears in this Record as Exhibit 1 following the Answer. The original exhibit will be certified to this court.)

BERNICE HANSEN.

I have been employed by G. W. Onthank Company for six years and I was working in its office on February 25, [fol. 24] 1955. Mr. Hinkle's desk was about four feet from mine. Mr. Bliss in Mr. Hinkle's presence called Dr. Posner and asked if he could get in for an examination. He then said to Mr. Hinkle that they were unable to get him in that afternoon, the doctor couldn't take him and I heard him make the arrangement with Dr. Posner on the telephone that he come Monday morning. I couldn't say whether Mr. Hinkle said in so many words that he could take the examination that day, but I assume he did. To the best of my belief this was after lunch, because Mr. Hinkle soon left and I believe he left around 3 P. M. or 3:30.

Cross-Examination.

My desk was in the same room with Mr. Hinkle's and my back was to his. I was at work at my desk when Mr.

Bliss came in. I don't remember whether Mr. Hinkle told Mr. Bliss he was going away and was very busy that day. I wouldn't say he didn't or I wouldn't say he did. I was present during the whole conversation. I was about four feet away from Mr. Bliss when he was telephoning. I kept quiet during the telephone call. I would say Mr. Hinkle left his office for the day about an hour after Mr. Bliss left. I will swear that I did not hear Mr. Hinkle tell Mr. Bliss that he wanted this appointment arranged for Monday because he was busy that day.

Redirect Examination.

I was close enough that I could have heard it, yes, if he had said it. Mr. Hinkle and I sat with our backs to each other. There is just room enough between the backs of our chairs for a person to walk through, about two feet. I was sitting in my chair when Mr. Bliss was telephoning, and Mr. Hinkle was sitting at his desk. When Mr. Bliss was phoning he was standing about four feet from me, and Mr. Hinkle was about two feet from me. During the phone call I refrained from doing anything that would make any noise so that he couldn't hear. We were too close. My full attention was at nothing else other than being quiet during [fol. 25] the phone call, so therefore I had my mind on nothing else at that time. Yes, I was listening to everything both of them said. Mr. Bliss probably left about five minutes after the phone call.

Plaintiff Rests.

Defendant's Testimony.

Dr. Edward R. Posner.

I have been practicing medicine in Des Moines since 1905. I was medical examiner for the defendant company for about ten or twelve years which included February 1955, but I am not now.

I remember being called by Rodney Bliss on February 25, 1955, about a medical examination of W. Max Hinkle.

He asked if I could make an examination and I said "Yes" and he said: "Can you make it very shortly?" and I said I could, and before the conversation was over he said "Well the man says he can't have his examination today but he would like to defer it until Monday." So I made an appointment for Monday about 11 o'clock. I have a notation of that on my diary pad. Exhibit A-1 and Exhibit A-2 are my record for the examinations for that day. They are in my handwriting. It says 11 A. M. and the man's name was Hinkle and it was for New England Mutual.

Cross-Examination.

I have made hundreds of examinations for the New England Mutual, probably two or three a week. I did not make any others that week. There is nothing on the slip for February 25 because there was no appointment for that day. I have no record that the appointment was made on Friday, February 25, but I have a memory. I remember Hinkle's name because it is the name of a common pill and when I read Saturday morning about his accident, that's the first thing I connected with his name and I knew that I had an appointment with him on Monday. My tickets show that on the previous Wednesday I examined [fol. 26] C. W. Westerman for the Northwestern or Equitable. That is the date of the examination. I cannot give you the date the appointment was made. Turning to the pad, it shows the nearest examination I made to that was Mr. Cordell on the 7th of March. I cannot remember the day the insurance company made the appointment to examine Mr. Cordell. Here a slip for Tuesday, the 25th, shows that on that day I examined Mr. Phillips. I do not know what date the appointment was made for that. Sometimes they were made a week ahead of time. My son and an office girl are also in my office. I can't remember who they talked to for the other appointments mentioned. I was the head examiner for this company for Des Moines. Without my books I cannot tell you how much money they paid me in 1955 or 1956, and from my memory I cannot give the date when any other appointment was made besides Mr. Hinkle in 1955.

Exhibit A 1-2 was duly offered in evidence by defendant and admitted.

Exhibit A 1-2.

These are two small pieces of paper torn out of a diary pad by the witness. Exhibit A 1 bears the date of Monday, 28 February, 1955, with a calendar for January, February and March, and no handwriting. Exhibit A 2 immediately followed it in the pad and bears the printed date Monday, February 1955, at the bottom and the pencil notation: "11:30 A. M. Hinkle N. Eng. Mut."

RODNEY BLISS, JR.

I am general agent of the defendant company in Des Moines. Exhibit B is a copy of my general agent's contract with the company. I have been in the life insurance business ten years since the war and eight years prior to the war. I have been the head of the agency for eight years.

I did not know W. Max Hinkle before I telephoned him in his office. I got his name from a friend in the mortgage [fol. 27] business who told me he had a mortgage on his house. I went to his office on February 25, 1955, and I am quite positive it was 11 o'clock in the morning. I had a telephone conversation with him before I went over. I told him briefly how the plan worked, over the telephone.

(Note. The plaintiff objected to the testimony of this witness as to what he told Mr. Hinkle about the decreasing term policy as an attempt to vary the terms of a written instrument and objected to the testimony about the answer to question 17A in the application as to aviation because no copy of the application was delivered to the proposed insured as required by Iowa law. The Court said: "I will take care of it by instructions to the jury.")

The type of policy was a decreasing term policy. The purpose was to cover the mortgage on his home; in case he should not live long enough to pay for it out of his earnings, why the home would be clear should something happen to him and it is designed to cover the mortgage, but it goes down each year. When I talked to him we covered it

very thoroughly. I showed Mr. Hinkle the pamphlet marked Exhibit C. It explains how this decreasing term policy works. It gives the premium rate, annual, semi-annual and quarterly premiums. It also shows what the first year initial coverage will be under a ten, fifteen and twenty year plan. It shows how it goes down each year over a twenty year period. The minimum amount that may be purchased is ten units. Each unit is $1050, so ten units $10,500. Assuming ten units, at the end of the second year it was down to $10,000, third year $9500, fourth year $9000 and so on. At the end of twenty years there is still $1000 worth of coverage left and by that time the mortgage is supposed completely liquidated. So there is always enough coverage, a little bit more than the amount of the mortgage he has. I discussed the mortgage with him and this was the plan we decided would be the better for his purposes to cover this $10,500 mortgage.

[fol. 28] Exhibit D is Part I of an application for life insurance. It was signed by W. Max Hinkle in my presence. The handwriting aside from the signature is all mine. I asked him his address and wrote it down, the question 3 as to where premiums would be sent and he gave the answer written down here. I asked him where he was born and he told me Atlanta, Georgia. I asked him what country he was a citizen of and he said U.S.A. I wrote the answers to questions 4 and 5. I asked him his date of birth, age, sex, single or married, occupation, employer, insurance in force on his life and truthfully recorded all his answers. I asked him questions 15 and 16 and wrote down his answers. I asked him the question 17a "Does the proposed insured plan to make flights as a trainee, pilot or crew member or had he made such flights within ten years?" His answer was "No" and I wrote it down at that time and in his presence. I wrote down his answers to questions 17 B and C. I asked him to whom he wanted the insurance payable and he answered his wife Maxine K. Hinkle, as beneficiary, otherwise surviving children. I asked him if he wanted to reserve the right to change the beneficiary and he said "Yes" and I wrote it down. The application was signed by Mr. Hinkle after the answers had been inserted there in my handwriting.

The first premium on a quarterly basis at age 42 was $21.40 as explained in the pamphlet Exhibit C.

Exhibit E is a check written by Mr. Hinkle, dated 25 February 1955 made payable to New England Mutual Life Insurance Company in the sum of $21.70, the quarterly premium on this $10,500 decreasing policy.

The form of insurance and the amount and premium are not stated in the application. Quite often in writing an application there are certain questions. They are all important and you have to know the answers to every one, but those you already know in advance are not always completed in the presence of the prospect because you already know them. For instance the form of insurance; I knew [fol. 29] what it was. Mr. Hinkle knew what it was and it is left blank. The amount is left blank and there was a reason for that; I knew what it was and Mr. Hinkle knew what it was. The important and essential questions have all been asked.

I did not know that Mr. Hinkle was a licensed airplane pilot. I had no knowledge of his flying activities. I did not know he had made a number of flights in his own plane.

I told Mr. Hinkle about a medical examination. I told him it was necessary for him to be checked over.

It was then about 11 and I said "Could you come over today." He said "I think I probably could." I called Dr. Posner in the presence of Mr. Hinkle and asked him if he would be available about a quarter of twelve. He said "Yes, that would be fine." I put the phone down and asked Mr. Hinkle if that sounded all right. He said: "On second thought I would prefer that we put this off for a few days because I'm going away over the weekend." I said "Would Monday be all right?" He said: "That sounds fine." I talked to Dr. Posner and said: "Would 11:30 on Monday be o.k.?" Doctor Posner said: "Yes," Mr. Hinkle said "Yes" and the appointment was made very definite for Monday morning, 11:30, February 28.

Exhibit 1 has perforated edges and was originally a part of Exhibit D. I tore it off Exhibit D and handed it to Mr.

Hinkle. The handwriting is mine. There is no place on the receipt for showing the plan of insurance applied for. I wrote the words "Immediate Coverage."

(Note: The following was admitted over the following objection and ruling:

Mr. Forrest: Because it is an attempt to vary the terms of this written contract, and trying to make an oral contract out of this written one.

The Court: I will take care of it by instruction to the jury.)

[fol. 30] I made it a point of making it crystal clear to Mr. Hinkle that this was decreasing term insurance, that the $10,500 was not a permanent situation, and as I have explained to the court and jury it decreases each year. That is the reason why I wrote it in the receipt, I put that in so there would be no misunderstanding at all on the part of Mr. Hinkle. I told Mr. Hinkle why I put that in and wrote it out so there is no possible chance of any misunderstanding.

The next thing I found out about Mr. Hinkle was when I got a phone call Saturday night telling me of the unfortunate accident.

The check, Exhibit E, was not deposited in the bank. Shortly after Mr. Hinkle's death I had a call from a law firm of Mr. Nyemaster and Mr. McLaughlin who said they represented Mrs. Hinkle. Pursuant to that call I mailed them the application Exhibit D on March 7, 1955, with the letter, Exhibit F. Mr. Goode and Mr. McLaughlin who are associated with Mr. Nyemaster called on me on May 19, 1955, and I wrote the letter Exhibit G to Mrs. Hinkle on that date and enclosed the check, Exhibit E.

Mr. Henry: May it be stipulated that shortly before the filing of this suit the check was mailed by Mr. Forrest back to Mr. Bliss.

Mr. Forrest: Yes.

After a medical examination has been taken we require an inspection report from the Retail Credit Company. We ask for them through the agency office. We did not order an inspection report in this case because the application was not complete. An examination had not been made.

Exhibit H is the aviation questionnaire which must be completed on any applicant who plans to make flights as a trainee, pilot or crew member or has made such flights within ten years. It is the aviation questionnaire referred to in the application Exhibit D. If it discloses that the applicant is a pilot or officer or crew member of an aeroplane we explain to him that he has a choice of signing an aviation [fol. 31] amendment which would exclude aviation where he is acting as a pilot, officer or crew member and also tell him he can be covered if he is willing to pay an extra premium.

Exhibit I is the aviation amendment limiting aviation coverage. It is attached to the policy if the insured asks for it. If the insured is killed while piloting his own plane, the beneficiary is limited to the return of premiums. If the applicant says he doesn't want to pay an extra premium but wants the amendment we ask him to sign it. If I had known that Mr. Hinkle was a pilot flying his own plane I would have asked him whether he wanted the aviation rider or wanted to pay an extra premium. I believe that $3.75 a thousand was the extra premium at that time.

Defendant offered in evidence as part of the testimony of this witness Exhibits B, C, D, E, F, G, H and I.

[fol. 32] Exhibit B.

This is the general agency contract between Rodney Bliss, Jr. and the Appellant effective January 1, 1954. The only parts material to this action are the following:

General Agency Contract.

This Contract is made and entered into at Boston, Massachusetts by and between the New England Mutual Life Insurance Company of Boston, Massachusetts, hereinafter

called the Company, and Rodney Bliss, Jr. hereinafter called the General Agent.

The Company hereby appoints the General Agent as its General Agent for The State of Iowa, except the Counties of Clinton, Cedar, Johnson, Scott, Muscatine, Washington, Louisa, Des Moines, Henry and Lee, and the State of South Dakota, subject to the right of the Company to change the territorial lines specified, to appoint other agents in said territory or to discontinue doing business in all or any part thereof subject to the right of the Company to change the territory specified, to appoint other Agents and General Agents in said territory or to discontinue doing business in all or any part thereof.

The General Agent agrees that he will honestly and faithfully perform the regular duties of the General Agent, and will conform to the rules and instructions of the Company concerning its General Agencies. His duties shall include the appointment and training of Agents so that the Company will be adequately represented throughout his territory, the providing of service to Policyholders and the collection of premiums. It is agreed that the General Agent is an independent contractor and that nothing herein shall create the relationship of employer and employee.

[fol. 33]

Section 1.

Scope of Authority

The General Agent is hereby authorized to appoint and contract with Agents and Brokers, to procure, personally and through such Agents and Brokers, applications for policies and to forward them to the Home Office of the Company for consideration, and to deliver policies and premium receipts, upon payment of the amounts specified therein and upon compliance with the terms and conditions governing such delivery.

Section 2.

Limitation of Authority

The General Agent is expressly forbidden to make, alter or discharge any policies, contracts or agreements on behalf

of, or in the name of the Company, or to waive any forfeiture, or, except as otherwise agreed to in writing by a duly authorized officer of the Company, to incur any obligations or liability for which the Company shall be responsible.

[fol. 34] **Exhibit C.**

This is a pamphlet of 16 pages. On the front cover is the following:

Decreasing Term Policy

Premium Rates

Dividends computed on the 1955 Dividend Scale

January 1955

Minimum Policy — 10 Units

New England Mutual
Life Insurance Company

Boston, Massachusetts

The second page contains a description of the policy the material parts of which are as follows:

Decreasing Term Policy

Minimum Policy — 10 Units

This policy provides convertible decreasing term insurance for a period of 10, 15 or 20 years. The death benefit remains level during each policy year as shown in the table of death benefits on the following page. Premiums and dividends in this booklet are per unit of face amount. Premiums are payable throughout the entire term period. The policy has no cash values.

The initial death benefit is $1,050 per unit. The minimum amount issued will be ten units ($10,500 initial risk) . . .

The policy will be issued at ages 20 to 55 on the 10 year plan, 20 to 50 on the 15 year plan, and 20 to 45 on the 20 year plan. . . .

[fol. 35] The third page is headed

Death Benefits Per Unit.

It gives the death benefits payable under the 10 year plan, 15 year plan and 20 year plan. The death benefits under the 20 year plan are stated as follows:

20 Year Plan

Year	Death Benefit	Year	Death Benefit
1	$1,050	11	$550
2	1000	12	500
3	950	13	450
4	900	14	400
5	850	15	350
6	800	16	300
7	750	17	250
8	700	18	200
9	650	19	150
10	600	20	100

Then follows a series of tables showing gross premiums per unit at various ages. On the 9th page appears the following:

20 Year Plan.

Gross Premiums Per Unit.

Age 42	
8.46	Annusl
4.30	Semi.
2.17	Quar.
.74	Mo.

The remainder of the pamphlet contains Dividend Illustrations which are not material in this action.

Exhibit D.

This is Part I of the application for life insurance, photostatic copy of which marked Exhibit 1, follows the answer. This exhibit consisting of a front and back page will be certified to the court.

[fol. 36] Exhibit E.

This is a check reading as follows:

W. Max or Maxie Hinkle No. 194

4011--9th Street

Des Moines, Iowa, 25 Feb. 1955

Pay to the order of New England Mutual Life Ins. Co.
$21.70 Twenty One and 70/100.....Dollars

Central National Bank
and Trust Company
Des Moines, Iowa

(signed) W. MAX HINKLE,

Exhibit F.

March 7, 1955

M Ray Nyemaster
9th Floor Register & Tribune Bldg.
Des Moines, Iowa

Dear Mr. Nyemaster:

I am enclosing the application blank on Mr. Max Hinkle. You will note that the application blank is not complete, but does contain the essential information and was signed by Mr. Hinkle.

We will hold the check awaiting further instructions from you.

Sincerely,

RODNEY BLISS, JR.,
General Agent.

[fol. 37] Exhibit G.

New England Mutual

Life Insurance Company Boston 17, Massachusetts

Rodney Bliss, Jr., General Agent
1010 Fleming Building
Des Moines 9, Iowa

Phone: 3-5158

May 19, 1955

Mrs. W. Max Hinkle
4011 Ninth Street
Des Moines, Iowa

Dear Mrs. Hinkle:

I am returning the check which your husband gave me on February 25.

Mr. Goode and Mr. McLaughlin were in my office this morning, and they will assist you in every way possible pertaining to Social Security benefits, etc. I know that you are in good hands, but if there is any way at all in which I can help, be sure and let me know.

Sincerely,

(Sgd.) RODNEY BLISS, JR.

[fol. 38] Exhibit H.

New England Mutual Life Insurance Company
Boston, Massachusetts

Questionnaire on Aviation

This form must be submitted if the proposed insured:

1. Plans to make flights as a trainee, pilot or crew member, or has made such flights within ten years.

(2, 3 and 4 not material).

1. Complete this Schedule

Hours as Pilot, Co-Pilot or Student	Past 12 Months	Prior to 12 Months Ago	Next 12 Months
Scheduled Airlines			
Company-owned Plane, Business Flying			
Charter, Sightseeing			
Private Planes			
Military Planes (If this section applies, also answer #9 below.)			
Student Instructor			
Student (Dual)			
Student (Solo)			
Other (Describe under Remarks			
Totals			

2. (a) Have you ever held a pilot's license or certificate?

.....

(b) Types .....

(c) Date of Issue.....(e) Last Renewal Date.....

(d) Is it now in force?...(f) Expiration Date .....

3. Have you flown or will you fly outside the United States or Canada? .....

4. Have you ever been grounded, fined or reprimanded for violation of any regulation? .....

5. Have you ever had an accident in a plane which you were piloting? .....

[fol. 39]

6. Are you a member of any air force or reserve thereof or do you belong to a flying or glider club? .....

7. Do you own or intend to own any aircraft? .....

8. Do you intend to pilot or take pilot instruction in the future? .....

9. Are you a jet fighter pilot? .....

10. On what date did you last pilot?

Month..... Year .....

Remarks: If any question 3 to 9 inclusive is answered in the affirmative, give full details here:

Witness..... Date..... 19....

Proposed

.....Insured.

(Sign name in full)

Notice to Agent: If insurance with aviation coverage cannot be issued at standard rates, is

( ) full coverage with extra premium, or

( ) standard rate with aviation exclusion, desired?

[fol. 40] Exhibit I.

New England Mutual Life Insurance Company

Boston 17, Massachusetts

Amendment Limiting Aviation Coverage

It is hereby agreed, and this Policy is issued upon the express condition, notwithstanding any contrary provision contained therein, that if the death of the Insured results from travel or flight in or descent from or with any kind of aircraft:

(1) operated for any training or testing or experimental purpose, or

(2) of which the Insured is acting as a pilot, officer or as a member of the crew,

the liability of the Company under this Policy and under any paid-up or extended insurance and under any Policy issued in exchange for this Policy, shall be limited to (a) premiums paid to the Company, less all dividends credited in any manner, or (b) the reserve on this Policy, whichever is greater. In either case the amount payable will be increased by the reserve for any additions and accumulated surplus, and decreased by any indebtedness which has not been repaid in cash, and by any amount allowed as a credit in connection with a change or reduction. In no event shall the liability of the Company exceed the amount which would be payable if this Amendment were not in effect.

The Incontestable Provision in this Policy is hereby amended by the addition of the phrase "and except as to any provision contained in the Aviation Amendment."

As part consideration for insurance in the New England Mutual Life Insurance Company, application for which is dated....., it is further agreed

that the foregoing provisions shall be an amendment to and form a part of said application and of any and every Policy issued pursuant thereto, and that they shall be binding on any person who shall have or claim any interest under any such Policy.

New England Mutual Life Insurance Company

Philip C. Raye, Secretary O. Kelley Anderson, President

[fol. 41]

Signed in my presence this....day of.....19...

.....
Agent.

.....
Sign name in full Proposed Insured.

.....
Sign name in full Applicant for Insurance.

Only one signature required if Proposed Insured and Applicant for Insurance are the same.

Attached as of the date of issue to Policy No.

App.-467-49

[fol. 42] Cross-Examination.

To the best of my recollection I was sitting on the left and beside of Mr. Hinkle when I filled out Exhibit D. I assume I was writing on his desk. I don't remember whether I wrote on a pull board that pulls out of the desk. I believe the desk was against the south wall. To sit at it one faced south. I was sitting to the left of Mr. Hinkle, as I recall. I am not certain whether I was writing with the paper on his desk or whether it was on the pull out board.

The company asked me about some of the questions that weren't filled out in Exhibit D. I wrote back and explained

that quite often I might not fill out each single question on the application because of those I already knew. There is no need of putting them down in the presence of the prospect. Before it goes into the home office every question must be answered.

It is not a fact that after Mr. Hinkle signed Exhibit D I added some other information to it after I got back to my office. I did not write anything on it after I left Mr. Hinkle's office.

I did not know that Bob Evans was in the next room and that he owned a half interest in the airplane and was in hearing distance. It is not possible that I left the aviation answers to fill out later.

It was not my training to get the name on the dotted line and get away as quick as I could before they changed their minds. In any selling business getting the customer's name on the dotted line is an absolute essential. It is not true that I got the name on the dotted line and got out of there as fast as I could. At times I have filled out every question except a few non-essentials that I needed the answer to. I have never waited to fill out any question as important as aviation until I got back to the office. I have written life insurance on people that fly airplanes, but [fol. 43] I honestly can't tell you how many times. I asked Mr. Hinkle the questions. I would guess I had written five applications in 1955 on people who answered the aviation question in the affirmative. My best estimate is that I filled out personally about 35 applications in all in 1955. I can't give you their names. I asked Mr. Hinkle what life insurance he had and wrote down Connecticut General and National Service Life. As to the Service Life I probably might have assumed that he had ten thousand and then changed it to five because most service men had ten. So that is obviously what happened, where the big "5" is over the top of the "10". I maybe thought and changed it to five.

DOANE ARNOLD.

I am second vice president of the defendant company. My duties are underwriting of selection of risks, approving

or declining or rating applications sent in by our agencies throughout the country. I am 51 years old and have been second vice-president since 1952 and employed in the same department for 26 years. In my division the records of applications received are kept, and in an adjoining one we have records of all policies issued and now in force. I have made a search of the files and no application by W. Max Hinkle of Des Moines was ever received at the home office.

I am familiar with the underwriting rules and practices of the company. If the aviation question 17a in the application, Exhibit D, is answered "yes" under the rules of the company it is then necessary to complete an aviation questionnaire, Exhibit H, giving us complete information as to the type and amount of flying the insured has done and submit it to the home office. At the bottom of the form is a notice to the agent reading: "If insurance with aviation cannot be issued at standard rates, is", and a block to be checked, "full coverage with extra premium", and a second block "standard rate with aviation exclusion desired?" By aviation exclusion I mean a rider which excludes death as a result of flight when the insured is a pilot. [fol. 44] Exhibit I is the form limiting aviation coverage in use in February, 1955. It contains a blank for the signature of the proposed insured. If he says he doesn't want that, we issue a policy with an appropriate extra premium to cover the particular aviation hazard involved. For private pilots flying their own plane $3.75 per thousand per year was the extra premium in February 1955. If Mr. Hinkle's aviation record had been disclosed in the aviation questionnaire a policy would not have been issued without an extra rating or without the limited aviation coverage.

In underwriting risks we try to supplement the information received from the application by a form of inspection report from Retail Credit Company. Exhibit J is the special narrative life report on which they complete the results of their investigation and inspection on applications for more than $10,000. Question 7 on this form says: "Any past or present aviation interest" and down further under instructions to the investigator it says "Any past or present interest or activity in aviation." Under the rules and underwriting practices of the company, we cannot give the

application final approval until the inspection report has been received.

If the application Exhibit D had gone in and assuming a medical examination had been had, a Retail Credit report disclosed an aviation record such as Mr. Hinkle's, the policy would not have been issued as applied for without further investigation at least. We would have gone back to our agency and asked for the aviation questionnaire to develop the true facts, and then if they had been developed as the record here shows they were, we would have offered to issue either with an extra premium or with an aviation exclusion clause.

Under the underwriting rules and practices of the company, it does not issue life insurance policies in excess of $10,000 in Iowa without a medical examination.

[fol. 45] Defendant offered in evidence Exhibit J.

Exhibit J.

This is a blank form of report used by Retail Credit Company, and headed "Special Narrative Life Report." It contains blanks for filling in the answers to twenty-seven questions as to occupation, income, illness, operation or injury, use of intoxicants, family history, reputation, etc., including

7. Any past or present aviation interest?

25. Aviation-Recreation. Any past or present activity in aviation-hazardous sports.

Cross-Examination.

If a man owns an aeroplane and answers the questions regarding aviation in Exhibit D in the affirmative, he would be eligible for every plan of insurance we have with either an aviation exclusion rider or it would cost him a little more money.

It is the agent's job to send in the application and the medical examination. We frequently issue policies when

the examination was not on the same day the application was taken. Very frequently it is on the same day. The premium date is not necessarily the date of the application. It may be one and the same. Some occasions yes our company does issue policies and make the due date of the premium the same date as the application.

It is not within my purview but I am sure we have filed a sample policy with the Iowa insurance commissioner. It is required to do business in this State.

The policy shows the policy anniversary. It is not in every case the date we issue the policy. Our policies could have a due date of premium which is the same date as the date we issued the policy or the date the application was made. If we had issued a policy in this case we probably would have made the due date of the premium the date of the application. Sometimes we make the due date the same date as the application. If the medical examination in this [fol. 46] case had been satisfactory and had been sent in and if it were completed within a very short space of time we would have issued it and made it the date of the application. If it had been made on this Monday following the application and had gone through, the due date of the premium would have been the date of the application.

[fol. 47] Stipulation.

Mr. Henry: It is stipulated and agreed that the following facts are true and correct, subject to objection on the part of the plaintiff as to the relevancy and materiality thereof.

That W. Max Hinkle, the decedent referred to in the petition, obtained a pilot's license from the Civil Aeronautics Administration on November 14, 1946, to pilot an aeroplane and that he held it until the time of his death; that he owned in partnership with others a Luscombe aeroplane from the spring of 1951 until August 1952; that he owned a Cessna aeroplane in partnership with others from

August, 1952, until the fall of 1953; that he owned another Cessna aeroplane in partnership with others from the fall of 1953 until the fall of 1954; that he purchased a Swift twoseater aeroplane in the fall of 1954 in partnership with one Robert Evans; that while flying this Swift aeroplane on February 26, 1955, the plane crashed near Commerce, Iowa, and he was killed; that he piloted a plane from the Municipal Airport in Des Moines every Sunday when weather permitted and that he had made numerous flights to various parts of the United States as a flyer within the eight years prior to his death; that when he applied for a pilot's license in December, 1954, he reported a total flying time of 1450 hours as a pilot, 43 of which occuring during the last six months of 1954.

By agreement of counsel, the certificate Exhibit K of the Civil Aeronautics Administration was put in the record.

[fol. 48] Exhibit K.

Department of Commerce

Washington, November 18, 1955

I hereby certify that..... according to the records in the Medical Division, CAA, Washington, D.C., William Max Hinkle was issued a Class 2 CAA medical certificated dated December 28, 1954, by Dr. Harry Burns of Des Moines, Iowa. William Max Hinkle on the date of examination claimed a total flying time of 1450 hours (43 of these during the six months prior to the examination).

Sgd. W. R. STOVALL,
Chief, Medical Division
(Official title)

Office of the Secretary.

I hereby certify that W. R. Stovall, M.D., signed the foregoing certificate, is now, and was at the time of signing, Chief, Medical Division, Civil Aeronautics Administration,

and that full faith and credit should be given his certificate as such.

In Witness Whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this eighteenth day of November, one thousand nine hundred and fifty-five.

For the Secretary of Commerce:

Sgd. W. M. MARTIN,
Administrative Officer.

[fol. 49] ROBERT W. MUSTARD.

I am manager of the Des Moines office of Retail Credit Company. The biggest part of our business is to furnish reports on applicants for life insurance to various companies. We furnish reports on applicants to the defendant. The orders come from the local general agency or may be ordered from the home office. Exhibit J is the blank form used for report on all applications of $10,000 or over.

Question 7 asks "Any past or present aviation interest?" and Par. 25, a narrative paragraph, covers the general heading "Aviation-Recreation" and we cover any past or present interest in aviation. We require our investigator to contact at least four people who have known the man for five years, employers, former employers, friends, neighbors and sometimes the person himself and ask about duties, activities, and aviation—if they have been a pilot, about how much flying they do, how many hours they put in, whether a pilot in the service, whether in the Air Corps, Naval Air Corps Reserve, Marine Air Corps Reserve, whether they fly on weekends and so forth.

Cross-Examination.

I don't know how many reports we made for the defendant in 1955. The records are at the home office in Atlanta,

Georgia. In every investigation we try to find out if the applicant is in any way involved in aviation.

Defendant Rests.

[fol. 50] Plaintiff's Redirect Evidence.

ROBERT HARRIS EVANS.

1432 Paytone Ave., Des Moines, 30 years old, lived in Des Moines all my life except during my military service. I have been employed for seven years by G. W. Onthank Company and was on duty on February 25, 1955. My bench was about fifteen feet through a partition from his desk, and there was an open door in the partition. Mr. Hinkle's office was about six feet by eight feet.

I was in my place of work on February 25, 1955. I passed through Mr. Hinkle's office several times while Mr. Bliss was there. He had his overcoat on as I recall and some kind of briefcase there on the desk. Max was sitting up at his desk facing more or less south. Mr. Bliss was sitting on his right hand, west side, of the outside of the desk area. It is extremely crowded. I occupy the same area right at the present and there isn't much room to work. Max kept his desk rather full of stuff. He had a ham radio receiver there, telephone, dictaphone, file basket and various papers, and didn't have very much room for anything else. Mr. Bliss was sitting on Mr. Hinkle's right filling out a form on a small pull tab that slid out of the desk. Mr. Hinkle's desk was crowded and it is doubtful if there was room to write with the paper on the desk. I didn't hear anything that was said by Bliss and Mr. Hinkle, probably a word or two, probably wouldn't have made any continuity out of it.

Max Hinkle's airplane activities were more or less of a hobby. He went in for it quite strongly. I actually own about forty per cent of the airplane. We had had several of them in the course of approximately five years. We started out back when I was first employed with the Onthank Company, and three of us bought an airplane in

shares. One of the other fellows dropped out. Everybody knew he flew. He took practically everybody up in the building except possibly some of the higher managerial [fol. 51] personnel around there, but the office girls had all been up with him. Everybody in the service department. Some of them had flown to Chicago with him, around the state on service calls and to Cedar Rapids, we would fly, it was quicker. I knew him quite well, intimately. We were together socially quite a bit.

MRS. BERNIECE HANSEN.

I am the same Mrs. Hansen who testified yesterday. I don't recall leaving my desk while Mr. Bliss was there. I was there when he came and when he left. I did not hear Mr. Bliss ask Mr. Hinkle any question about aviation, or hear Mr. Bliss say anything at all about aviation.

I had known of Mr. Hinkle's flying activities for six years and had flown with him. I knew he flew practically every Sunday morning and flew to Omaha in an airplane. To the best of my recollection I did not hear aviation mentioned by either Mr. Bliss or Mr. Hinkle.

I saw Mr. Bliss writing on a little pull out section of Mr. Hinkle's desk on the right of Mr. Hinkle. The pull out board was on the west side of the desk, just a little space about the size of a sheet of paper, pulls out, and anybody writing on it would have to be sitting back a little bit, and there isn't too much room.

Cross-Examination.

I testified yesterday that I didn't pay much attention to the conversation between Mr. Bliss and Mr. Hinkle until Mr. Bliss picked up the telephone. In that small area it is impossible not to be aware of a conversation going on. Unless there is something that draws your particular attention you are not going to be alert to everything that is said.

Plaintiff Rests.

[fol. 52] Motion to Require the Plaintiff to Elect Between the Counts of Her Petition.

Mr. Henry: I move that the court require the plaintiff to elect which count she is now suing on because obviously she can't recover $42,000.

The Court: No, sir, only one recovery, and I think so far as the proof is concerned, if she is entitled to recover it would be in her individual capacity and not in her representative capacity. The testimony was she was named as the beneficiary.

Mr. Forrest: In view of the answer . . . . Mr. Henry replied that if she has any right to recover it is in her individual capacity, so in view of that answer I would concede that he is correct in his answer.

The Court: Well in the inspection of the petition if she is entitled to recover it would be on the fourth count. What do you have to say about that?

Mr. Forrest: But he surely can't make me elect between Counts III and IV. I think I have a right to submit both III and IV . . . . As long as "immediate coverage" is written in there, we have a right to disregard all those conditional things and treat it as exactly what it says, a contract of immediate coverage . . . . I understand that in any civil action the court can submit every count and all the things that are claimed in each count and then tell the jury: "However if you find on the first count, find $10,500; if you don't find on that one, then consider the second one, but you can't find but $10,500 altogether."

The Court: You make averments of the first count. You adopt them in your fourth count. You adopt the averments of your first count in the fourth count.

Mr. Forrest: Well I don't really care how it's submitted, so it is submitted to the jury.

[fol. 53] Ruling on Motion for Election.

After further colloquy between the Court and counsel, Mr. Forrest requesting that it be submitted as a contract

for immediate coverage without any conditions as one theory, the Court ruled:

The Court: The case submitted to the jury will be on the fourth count.

[fol. 54] At the close of the evidence the defendant moved the court to direct a verdict in its favor as follows:

Motion for Directed Verdict.

Now then at the close of the evidence the defendant moves the court to direct the jury to return a verdict for the defendant on Count IV of the petition on the following grounds:

1. The conditional receipt offered in evidence, and alleged to be a contract of insurance is not a contract, but a receipt delivered to evidence the payment of a first premium in connection with an application for life insurance, and the terms upon which the first premium was paid. It was merely a part of a transaction which constituted an application for life insurance. Said application was not completed and was not accepted by the defendant, and there was no meeting of the minds of the parties to form a contract.

[fol. 55] 2. The said conditional receipt was conditioned upon the receipt of satisfactory evidence at the home office in Boston that the proposed insured was insurable for the amount, plan and rating applied for. It appears from the record that no such evidence was sent to the home office of the defendant at Boston or received by it there, and in fact, no such evidence could have been furnished by the proposed insured in view of his aviation record.

3. The conditional receipt contemplated and expressly provided in the third clause of the printed matter therein "If the company determines that the proposed insured is not so insurable, said application shall be declined and the amount paid will be refunded upon return of this receipt."

This provision requires and contemplates a determination by the company as to the insurability of the proposed insured for the amount, plan and rating applied for, and, provided that, if the company determines that the proposed insured is not so insurable, the application will be declined; that this provision negatives the construction of the receipt as being in itself a contract for temporary insurance.

4. The insertion of the words "immediate coverage" below the amount of insurance applied for in the conditional receipt does not convert the receipt into a contract of temporary insurance in view of the fact that a decreasing term policy was applied for, and the proposed insured was advised that the amount of insurance in the first year was $10,500, and would decrease annually thereafter.

5. If said receipt is construed to be a contract of insurance because of the addition of the words "immediate coverage" under the amount of insurance applied for, said contract is not binding on the defendant because the agent, Bliss, had no authority to make, alter or discharge any policies, contracts or agreements on behalf of or in the name of the company, or, to waive any forfeitures, or, except as otherwise agreed to in writing by a duly authorized officer of the company, to incur any obligations or liability for which the company should be responsible.

[fol. 56] 6. If said receipt is construed to be a contract of insurance, it is not a valid contract under the laws of Iowa because the defendant was prohibited by the statutes of Iowa from issuing contracts of insurance in an amount more than $10,000 without a medical examination duly passed and approved by the medical examiner or the medical board of the company. Section 508.28 of the Code of Iowa, 1954, requires or contains this language: "The Commissioner of Insurance shall decline to approve any form of policy unless issuance is based upon the satisfactory medical examination of applicant by a physician, and no policy or contract shall be issued by any insurance company to any individual until such examination has been passed and duly approved by the medical examiner or the medical board of the company." And then in a subsequent section

there is a provision that non-medical insurance may be issued up to $10,000.

7. It appears from the record that there was no medical examination because of failure of the proposed insured to have an examination. Therefore, he failed to furnish an application upon which the defendant, under the law of Iowa, could insure his life for $10,500.

8. It appears from the evidence that the proposed insured was informed that a medical examination was necessary in connection with his application for life insurance. His failure to take said medical examination, as shown by the record, was not due to any act or neglect on the part of defendant, and there is no evidence that said medical examination was waived by the defendant.

9. It appears from the evidence that because of the proposed insured's aviation record, he was not insurable for the plan and rating applied for under the defendant's underwriting rules and practices. Regardless of whether the answer to Question 17(a) in the application was written by the agent before or after the proposed insured signed the application, if he had answered "yes" to said question he was not insurable for the plan and rating applied for.

[fol. 57] After oral argument by counsel for the defendant and the plaintiff, the following colloquy took place between the court and counsel for the defendant:

Mr. Henry: That is a point I didn't cover in my brief, and I think perhaps your honor and I don't see with the same eye, and I can submit authorities over the noon hour, I think, to prove to your honor that insurability does not mean good health alone. That is why they get the retail credit report. It means habits. It means does he take drugs? Is he a drinker? Has he got a family history of insanity?

The Court: I understand that, but it is the law that insurability and good health are practically synonymous.

Mr. Henry: Yes, but it means more than insurability. That he can't be insurable--

The Court: (Interposing) I understand it is the physical condition of the insured.

Mr. Henry: And his history.

The Court: He may have had bad credit, you know.

The Court: Suppose he passed a perfect physical examination, but he is a dipsomaniac, they won't insure him because of his habit.

The Court: If I may say, that the insurability means the condition of good health.

Mr. Henry: I think the courts have held more.

The Court: I understand all the details, and that is correct, but I say the courts have said those terms are practically synonymous.

Mr. Henry: I would like to say this about the construction of this contract, because I think that is what your honor has in mind. Now, let's forget about anything said about good health. If Mr. Hinkle had taken his medical examination on Friday and had been passed by the medi-
[fol. 58] cal examiner, even though the application had not been mailed to Boston and then he had been killed in an automobile accident, no question about aviation record, the company would have paid the claim.

The Court: No, sir, not under your contention.

Mr. Henry: Yes, sir, I think it would, because he was insurable at the time of the application.

The Court: They must determine at Boston whether he was insurable.

Ruling on Motion for Directed Verdict.

The Court: The demurrer to the testimony is overruled or the motion to dismiss, whatever we may designate it and the only issue before the jury will be the question as to whether or not he was in good health at the time this conditional receipt was given him.

Mr. Henry: May I submit, your honor, that there isn't any evidence at all about that in the case.

The Court: Well I think there is. I think the jury would be justified in taking all the facts in the case.

[fol. 59] The Court thereupon gave the following oral instructions to the jury.

(Court's Instructions to the Jury)

Ladies and gentlemen of the jury, in the first place, I desire to very sincerely thank each and every one of you for the very careful attention that you have given to the testimony adduced in this trial. At the beginning of my charge I should say to you that the law of the case you have nothing to do with. It is the duty of the judge, at the conclusion of all the evidence, when counsel have finished their arguments, to instruct the jury on the law of the case, and I should tell you that with the law of the case you have nothing to do. It is your duty to accept the law as I may declare it and apply the principles of law so declared in your deliberations. This is the rule. Even though you should be of the opinion that I am not accurate on the law, nevertheless, there are tribunals for correction of any mistakes that I might make, and the jury is not that tribunal, so it is your duty to accept the law as I may declare it to you. On the other hand, with the facts of the case I have nothing to do.

Now it is true that I may, and I shall review the evidence in the case, and in doing that I might express opinions upon the evidence and I may recall the testimony differently from the way in which you remember it. If and when I do that, if any recollection of the evidence should not coincide with yours then it would be your duty to follow your own recollection and not mine. If any opinions that I might express upon the evidence should differ from yours then it would be your duty to follow your own opin-

ions and not my opinions. Nothing that I say to a jury, or say to you on the subject of evidence is binding upon the jury, whereas, everything I say to you on the [the] subject of law is binding on the jury. And when you go to your jury room you should, and I am sure you will, go there in the same spirit of fairness and impartiality that characterized you when you qualified as jurors in the case.

[fol. 60] At no stage of the lawsuit should either the court or the jury become inflamed with passion or prejudice, because as you know, when we have an emotional upsurge it is like a fog before our physical eyes. It dims our vision and we cannot see things clearly, and of all people in the world who ought to see things clearly it ought to be judges and jurors, because we are dealing with one of the most sensitive things in the world, and that is justice, and we can't do justice unless we know the facts and see them clearly, without bias and without prejudice.

Again, the issues in this case—I say, again the issues in this case are not complex, but on the contrary, they are very simple, and the issue that is about to be submitted to you is a very simple issue. You understand as far as the contract is concerned, or contracts, it is the duty of the court as a ma'ter of law to tell you what a contract is. It is the jury's duty to tell what the facts are.

Now to simplify the issues, and in saying it, my duty is to simply the issues. I must not be put in the category of intimating that able counsel in the case have made the issues complex. They have not done that. For them, I think they have diligently and ably brought to the jury and to the court all the facts in the case as they saw them and as they believed them to exist, and for which they are to be commended and to be thanked by you and by me for their diligence in doing that.

The facts in the case, if I may state what the facts are, and most of them are undisputed—as you understood, the defendant insurance company is a great and I'll say commendable insurance company. It has the confidence of the

Insurance Department of the State of Iowa, or did have, which licensed it to do business in the State of Iowa on the theory that it would deal honestly and fairly with its citizens. It would not have licensed it if it had a record of doing otherwise.

[fol. 61] On the 25th of February, 1955, and there is no dispute about that, Mr. Hinkle, the deceased, that is, the insured, if he were insured, the husband of the plaintiff, Mrs. Hinkle, was solicited by Mr. Bliss for insurance; that Mr. Bliss had a right to solicit him for insurance. That was his business. It was a legitimate business, and he had a right to do that. I'm speaking about that so that we will have no thought in our minds that something was done that ought not to have been done. Mr. Bliss approached him, as he had a right to do, for a contract of insurance. And it was agreed between them that the policy of insurance be taken out in the defendant insurance company and that the amount should be $10,500, and that I inferred from all the testimony that Mr. Hinkle had a mortgage on his property, on his home, and the policy was so drawn, or was to be so drawn that with the payment of the mortgage the amount of insurance would decrease. Now the object of that—I don't need to tell this very fine and intelligent jury that the object of that was that if anything happened to him then Mrs. Hinkle would have the benefit of an insurance policy that would discharge the mortgage on her home so that it would be free. A very commendable attitude on the part of the husband in seeking to protect his wife against a debt that might hang over her home in the event that he should pass on. Now there is no question about that conversation, no question but that at that time Mr. Hinkle gave a check for the amount of money that is named, $21.70, in payment of the insurance, and then when that was done Mr. Bliss then delivered to him, and there is no question about that, no controversy about it, gave to him what has been designated and shown to you as a conditional receipt.

Now then, it is the duty of the court to speak about the conditional receipt as a condition precedent to instructing

you further on the law. That conditional receipt, if I may say, an application was signed, certain statements were made on the application which I regard are of no import-
[fol. 62] ance whatever to the jury because that conditional receipt contained this recital: "Received Twenty-one and seventy hundredths dollars in connection with an application made this date to the New England Mutual Life Insurance Company." In connection with it. The application did not become a part of the receipt. It was only given in connection with it. Whatever statements were made in the application were not warranties, were not guarantees, were not anything, but just in connection with that this conditional receipt was given. Now then, you are interested in knowing what the recital was—conditional receipt was that—it says "application made this date." That is the receipt—"$21.70 in connection with an application made this date to the New England Mutual Life Insurance Company of Boston, Massachusetts for insurance of $10,500 on the life of W. Max Hinkle." Then that is the end of the sentence. Now let's see what the further recital was. "The insurance applied for"—"The insurance applied for," not the insurance written, but the "insurance applied for shall be in full force and effect from this date." Now there was a condition there, and that's where you are going to be called upon to say whether that condition was fulfilled—"provided the proposed insured", not the insured, but the proposed insured, "is now in good health." Now those words are easily understood. I repeat this: "The insurance applied for shall be in full force and effect from this date, provided the proposed insured," not the insured, but the proposed insured, "is now in good health." And then it says, "not withstanding"—that is true, "not withstanding any change in the proposed insured's health." In other words, he might become ill tomorrow, but if he is in good health today then this insurance is in force, this proposed insurance is in force; not the policy, but the proposed insurance is in force. "Notwithstanding any change in the proposed insured's health or condition due to disease hereafter acquired, or to any subsequent casualty."

[fol. 63] Now, "casualty," as I understand, means an accident, or if something would happen. So that the arrangement that apparently was made at that time as far as the proposed insurance was concerned, as I construe this contract, the insurance company meant to say to this man, "If you take this policy we will give you temporary insurance until we have tested your insurability, and then if you are not insurable," not a question, they say, "we will give it to you if you are in good health, and the insurance will be in effect if you are in good health at the time you apply for the insurance, and then we will take time to test your insurability and it may be that later on we will not issue the policy." It is just proposed insurance. But in the meantime the company says, "We will give you insurance. Now then, you say to me, and I don't need to instruct you as to my reasoning in the case, but if that were not true, as contended by able counsel in the case, that the insurance is not effective until a policy was delivered, that is not the terms of the contract. The terms of this conditional receipt are that the insurance is in force now because of proposed insurance, and if it were not, and had to await the final determination of the insurability of the applicant then there was no insurance in force at all. What was the object of making this recital except that while the policy was being worked out and the insurability of the applicant was being tested as to rate and things of that sort, the company proposed to give him interim or temporary insurance, and that is my interpretation of the contract. So my interpretation is that if Mr. Hinkle was in good health at the time that this conditional receipt was given, and if—and there is no dispute about that—if on the next day he lost his life, as it is admitted here, then under the terms of this contract it was a casualty that was insured against, and then the company would be liable for the amount of the policy.

[fol. 64] Now then, that constitutes the issue. I'm going into this in detail because the interpretation of the contract is a question of law and not a question for you to determine. The sole question for you to determine is was Mr. Hinkle in good health at the time this policy was—this contract was made with him—at the time this conditional

receipt was given to him. Now then, since that is the issue in the case, and the only issue in the case as far as the jury is concerned, then it is my duty to instruct you on the general principles of law applicable to testimony before juries. Since that is the issue, I should say to you that in cases of this type the burden of proof is upon the plaintiff to prove the averments of her complaint, and that she must do by a preponderance of the testimony. Now, by a preponderance of the testimony I do not mean necessarily the greater number of witnesses, but I do mean the testimony in that side which seems to the jury the more reasonable, the more convincing and the more satisfying to your minds. If the plaintiff, Mrs. Hinkle, has not met the burden of proof then she is not entitled to recover, or if the testimony should be even in the balance, then she is not entitled to recover.

Now, again, I would be derelict if I did not instruct you on the matter of credibility of witnesses. I told you in the beginning that you must judge the facts and not the court, so it is my duty to instruct you that you are the sole judges of the credibility of the witnesses and the weight to be accorded to the testimony of each and every witness who testified in the case. In determining the weight and credence you should accord to the testimony of any witness it is your right and your duty to take into account the conduct and demeanor of the witness on the witness stand, his interest in the case, the results of the case, if any, his bias or his prejudice against the parties, if any, his opportunity to know and understand the facts about which he gave testimony, the reasonableness or the unreasonable-
[fol. 65] ness of the testimony of such witness or any other fact or circumstance that might shed light on the truth or the falsity of said witness' testimony, and if you should believe that any witness has wilfully sworn falsely to any material fact in the case, it is then your right to disregard in whole or in part any part of the witness' testimony, or you may believe it in part and disregard it in part, as your own conscience may dictate.

Now as to the law in the case, if you should find and believe from the evidence in the case that on the 25th day

of February, 1955 the decedent, W. Max Hinkle, mentioned in the pleading, was in good health at the time that he applied for and paid for the policy of insurance in suit, then the plaintiff is entitled to recover. If you find and believe from the evidence that he was not in good health at that time, then under the plain terms of the contract—of the recital of the conditional receipt, the plaintiff is not entitled to recover. Now that is the sole issue before you and that is the question that you will decide when you go to your jury room.

Now then, I think it would be proper to review where a jury has been sitting for two days and the number of witnesses passed before it, and counsel on both sides have very properly presented matters to the court, and sometimes the jurors are confused and sometimes it is an aid to them if the judge should recall some of the witnesses and mention the testimony of some of the witnesses so that the witnesses might pass in review before the jury so that the jury can recall what the witness said, and that enables you to review the facts in the case. Mrs. Hinkle was the first witness who testified in the case. Mrs. Hinkle testified about the fact of her husband leaving early Saturday morning, early on Saturday morning of February 26, and that conditional receipt was left on the table by him. Probably an hour after her husband had left. Her whole testimony was to identify the receipt, and then she learned about 8 o'clock of the untimely death of her husband.

[fol. 66] The next witness was Berniece Hansen. She was the young lady who—Mrs. Hansen—works over there at the same place where Mr. Max Hinkle worked. Her desk was right close to his. Now, her testimony was that she was there and she overheard the conversation between Mr. Bliss and Mr. Hinkle; that, part of it.

Now, ladies and gentlemen of the jury, my viewpoint is such of this case that it is wholly unimportant whether Mrs. Hansen heard part or all, or anything of that sort, because here is a contract that says if he were in good health at

the time then there was temporary insurance that would pay his beneficiary the amount of the insurance. If he were not in good health then he is not entitled to recover regardless, because this conditional receipt only refers to an application. It makes no difference what was said in that application in my judgmet. The whole thing is whether he was in good health at that time. The application is not made a part of the conditional receipt, which I regard as contractual. It is not a part of it so it is unimportant whether Mrs. Hansen heard part or all of the conversation. Then of course counsel introduced this conditional receipt, the receipt that I have discussed before. And there is no issue. Able counsel for the defendant said, "Why, yes, sir, that receipt was issued." Mr. Bliss said, "Yes, I gave him that receipt and I wrote on it "immediate coverage."

Now then, Mr. Bliss testified that he put those words on there, and I am not giving any consideration to those words at all because I am treating this—the recital of the contract that "This insurance applied for shall be in full force and effect from this date," that would mean exactly what Mr. Bliss put on there, immediate coverage. From this date. That is the way I would interpret it.

Now then, I go down to the defendant's witnesses. Doctor Posner testified, and Doctor Posner testified that he was available. Now there was a little difference in the tes- [fol. 67] timony because probably Mr. Bliss testified that Doctor Posner was not available to examine Mr. Hinkle on that afternoon. Ladies and gentlemen of the jury, I regard that as wholly unimportant whether he was ready to examine him then or not. Neither do I think that a jury ought to say there ought to be a penalty inflicted because he didn't examine him then or that afternoon. Doctor Posner said that he was ready to examine him. Mr. Hinkle said that he was engaged that afternoon and couldn't submit to the examination. That was agreeable to everybody. It was agreed then he could go on Monday; not an unusual transaction, but I regard that as wholly unimportant be-

cause that was all based not upon the proposed protection but upon a policy that would be finally issued if they found him insurable. Now I find that the jury need not spend any time with Doctor Posner. I thought he was honest and upright and fair before the jury, and gave his recollection of what occurred; but suppose that he was ready and suppose that Mr. Hinkle said, "I am not ready to come over." Then the jury would say to me, "Does that make any difference?" I would say, "No, it doesn't make any difference because it was a cordial, mutual agreement that he was to go the next Monday and be examined." Not for the proposed insurance, but to test his insurability for the issuance of a policy. And as I said, this receipt contains the recital that the insurance shall be in force, the proposed insurance shall be in force if it appears that the proposed insured is in good health at the time of this conditional receipt, so that as I said, that submits to you ladies and gentlemen the only issue in the case.

Now then, Mr. Bliss testified. He was the agent of the company, engaged in a highly legitimate business. He had a right to go over and see Mr. Hinkle. We should not hold any prejudice or any feeling, and I am sure we do not, because he was engaged in his calling, in his business. He went over to see Mr. Hinkle about the policy and took the first part of an application. Now he said he wrote [fol. 68] down exactly what Mr. Hinkle told him. Let's assume that he did that, but the application signed by Mr. Hinkle was not a warranty of its truth. It had nothing to do with this conditional receipt. This receipt was given in connection with that and nothing more, so that when he wrote it down, whether Mr. Hinkle signed it and he wrote it later, my judgment is that Mr. Bliss was telling you the truth and that he wrote it down as Mr. Hinkle answered the questions, and there was some question as to whether or not he was entirely frank about the fact that he was operating—doing some flying. That would have all appeared later on, or probably in the final question of his insurability and the final determination as to whether the policy should be issued to him, then all these matters would have been settled and he would have either paid a

higher premium or the company would not have issued a policy at all, according to Mr. Arnold who testified in the case.

Now the next witness was Mr. Arnold, and he told you about the conditions under which policies are issued, not temporary insurance as in this case, to a proposed policyholder, but where policies were actually issued, and what the conditions were, whether they would have been issued or not, and he told you that in the event one was a flyer then no policy would be issued unless they paid a higher premium because of the hazards of doing pilot work, and of course, whether there is a hazard, we regard flying as more or less hazardous. Life in nearly all things becomes more or less hazardous, but that is not important here.

Now Mr. Robert W. Mustard testified he was the credit man engaged in—again in a legitimate and commendable business. It was his business to find out where the insurance company was about to issue an insurance policy and they were determining as to the insurability of an applicant, then they would put it in the hands of Mr. Mustard and his force, "Find out about this man." And if Mr. [fol. 69] Mustard replied that the man is in good health but he doesn't pay his debts and he wouldn't pay the premium, the insurance company would say, "We will not issue a policy to a man who won't pay his premium," or they might say that other things that would make him not insurable within the purview of the company; that was the reason that later on in the receipt it said that "provided that satisfactory evidence that the proposed insured is now insurable for the amount, plan and rating applied for is received at the home office of the company in Boston, "but if the company determines that the proposed insured is not so insurable; that is, after they have got all the data and after Mr. Mustard has made his report and they find he is not insurable and then they would say to him, "We can't issue the policy." But nevertheless here it says "the insurance applied for shall be in full force and effect —effective this date, provided the proposed insured is in

good health." That was the contract. Not on a policy of insurance, but on this receipt.

Now then, I believe I have covered all the testimony. Mr. Robert A. Evans testified in rebuttal. I do not believe that the jury need spend any time about that. Mr. Evans testified that he worked at the same place. He didn't overhear the conversations, and I do not regard that as important. That he was joint owner of the airplane flown by Mr. Hinkle; and then Mrs. Hansen was recalled to testify about what she heard at the time.

Now then on the evidence as to whether the deceased was in good health, and counsel has called my attention to the fact that there may not be any affirmative evidence—in other words, no witness said, "Well, we saw him on that day and he was in good health,"—a jury would be able to disregard that testimony if upon all the evidence in the case they would reach a conclusion that Mr. Hinkle was not in good health because you have all the facts in the case and you would consider these things. In the first place, there was offered before you a certificate of some doctor in connection with his flying operations, conditioned probably on his pilot's license, only a few months before [fol. 70] the unhappy casualty, unhappy and untimely death. In that they certified in substance that he was in good health, or otherwise a license would not have been granted to him.

Now then, you heard what was said about him, the work he was doing, the flying that he did, and what his wife said about him. And upon this testimony it is sufficient for you to reach a conclusion as to whether he was in good health or not, and that is the issue before you.

Now then, ladies and gentlemen, I believe I have covered all the law. Now I should say to you that you heard counsel tell you and tell the court—there are four counts in the complaint and they all mean about the same thing. Probably you weren't here. Mrs. Hinkle has brought the suit here as administratrix of her deceased husband's

estate and then she brought the suit in her own individual capacity, but she says in her complaint that if—she doesn't know—but that if she is entitled to recover independently of the administratrix, why then she asked that recovery be allowed her in one of the counts, so I say to you if your verdict should be for the plaintiff it would not be for Maxine K. Hinkle—Administratrix of the Estate, but for Maxine Hinkle because the undisputed testimony was—Mr. Bliss said that—and the application itself showed it, that she was named as the beneficiary, and being named as the beneficiary, then she is entitled to recover as the beneficiary under this proposed insurance.

[fol. 71] The jury thereupon returned the following

Verdict.

(Name of Court)

Maxine K. Hinkle, Plaintiff,
vs.
New England Mutual Life Insurance Company, Defendant.

We the jury in the above entitled cause find the verdict for the plaintiff and assess her damages at $10,500 with interest at 5% from February 26, 1955.

H. L. BLOESS,
Foreman.

(Said verdict was filed on January 11, 1957.)

[fol. 72] Judgment Entry.

(Filed in U. S. District Court on January 15, 1957)

In the United States District Court for the Southern District of Iowa, Central Division.

Maxine K. Hinkle, Administratrix of the Estate of W. Max Hinkle, Deceased, and Maxine K. Hinkle, Plaintiffs,
No. 3-659. vs. Civil.
New England Mutual Life Insurance Company of Boston, Massachusetts, Defendant.

The court having determined from the pleadings and the statement of counsel on both sides in open court that the cause of action was in Maxine K. Hinkle as an individual and not as administratrix, and having submitted the case to the jury upon Count IV of the petition, and having withdrawn from consideration of the jury all counts except Count IV, and the jury, under instructions of the court, having returned a verdict in favor of Maxine K. Hinkle in the sum of $10,500.00, with interest at 5% from February 26, 1955, the court finds that the plaintiff, Maxine K. Hinkle, is entitled to judgment against the defendant thereon.

It Is Therefore Adjudged that the plaintiff, Maxine K. Hinkle, be and she hereby is awarded judgment against the defendant in the sum of $10,500.00, with interest thereon from the 26th day of February, 1955, and the costs of this action, and that the administratrix take nothing.

Dated at Des Moines, Iowa, this 15th day of January, 1957.

ALBERT L. REEVES,
U. S. District Judge.
(By assignment)

[fol. 73] (Motion of Defendant for Judgment notwithstanding Verdict)

(Filed in U. S. District Court, February 18, 1957)

(Title of Case)

Comes now the defendant and moves the court to set aside the verdict rendered in the above cause on the 11th day of January, 1957, together with the judgment entered thereon on the 15th day of January, 1957 and to enter judgment in its favor notwithstanding said verdict and as grounds for said motion shows to the court that at the close of all the evidence it moved the court to direct the jury to return a verdict in its favor upon the grounds stated in said motion, that the jury returned a verdict in favor of the plaintiff, and it is now entitled to judgment

in its favor despite the adverse verdict in accordance with its motion for a directed verdict and on the following grounds as set forth in its motion for a directed verdict:

(There follow in 9 numbered paragraphs the identical language of Paragraphs 1 to 9 inclusive of the Motion for Directed Verdict hereinbefore set forth and the following additional paragraph)

The defendant also moves the court for judgment in its favor notwithstanding the verdict on the ground that there was no evidence in the record to support a verdict for the plaintiff on the issue of fact submitted to the jury by the court, namely the good health of W. Max Hinkle on February 25, 1955, and that on that issue alone a verdict should have been directed for the defendant.

Duly signed by defendant's attorneys.

[fol. 74] (Memorandum Opinion of District Court on overruling of Motion of Defendant for Judgment notwithstanding Verdict)

(Filed in U. S. District Court, January 18, 1957)

(Title of Case)

Able counsel for defendant has filed a motion for judgment notwithstanding the verdict. This has been carefully examined.

It is set forth that the conditional receipt which constituted the basis of the action was but a receipt for premium and did not provide insurance for the applicant.

Adverting to the receipt, this recital is observed:

"The insurance applied for shall be in full force and effect from this date, provided the Proposed Insured is now in good health, * * *."

The subsequent provisions of the receipt were to the effect that the final consummation of the contract or application for insurance, and the issuance of a policy were or would be conditioned upon "satisfactory evidence that the

Proposed Insured (emphasis mine) is now insurable for the amount, plan and rating applied for, etc."

It is to be noted that the applicant had the benefit of insurance for the full amount applied for if it appeared that he was in good health at the time.

It was then provided that a policy would be issued only if it appeared later that the "Proposed Insured" was insurable. It is obvious that it was the purpose of the defendant to grant temporary insurance if the applicant be in good health, until it was determined later whether he was insurable.

[fol. 75] The applicant deceased before such determination should be made and the receipt, if it meant anything, meant that his beneficiary was entitled to the amount covered by the receipt.

It follows that a motion for a judgment non obstante veredicto should be and will be overruled.

Des Moines, Iowa, January 18, 1957.

ALBERT L. REEVES,
U. S. District Judge.
(By assignment)

[fol. 76] (Order of District Court overruling Motion of Defendant for Judgment notwithstanding Verdict.)

(Filed in U. S. District Court on January 18, 1957.)

(Title of Case)

The motion for judgment notwithstanding the verdict in the above cause having been taken up for consideration, and it appearing from an examination of said motion that the verdict and judgment were correct and that said motion should be overruled,

It Is Therefore Ordered And Adjudged that said motion be and the same hereby is overruled.

Des Moines, Iowa, January 18, 1957.

ALBERT L. REEVES,
U. S. District Judge.
(By Assignment)

[fol. 77] Notice Of Appeal.

(Filed in U. S. District Court February 7, 1957, with appeal bond.)

In The United States District Court
For The Southern District Of Iowa
Central Division

Maxine K. Hinkle, Administratrix of the Estate of W. Max Hinkle, Deceased, and Maxine W. Hinkle, Plaintiffs,
No. 3-659. vs. Civil.
New England Mutual Life Insurance Company of Boston, Massachusetts, Defendant.

Notice is hereby given that the defendant New England Mutual Life Insurance Company of Boston, Massachusetts, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment entered in this action on the 15th day of January, 1957, and the order of court entered on the 18th day of January, 1957, overruling its motion for judgment in its favor notwithstanding the verdict of the jury.

Dated this 7th day of February, 1957.

PHINEAS M. HENRY,

RALPH A. CHURCH,

LUTHER L. HILL, JR.,
Attorneys for Defendant-Appellant,
1111Equitable Building,
Des Moines 9, Iowa.

[fol. 78] (Order of District Court extending Time to file Record on Appeal, etc.)

(Filed in U. S. District Court on February 7, 1957.)

(Title of Case)

On February 7th, 1957, the defendant herein filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit. Pursuant to the oral application of the defendant's attorneys and under the provisions of Rule 73g of the Federal Rules of Civil Procedure.

It is hereby ordered that the defendant may have not more than ninety (90) days from the date of the filing of the notice of appeal in which to file the record on appeal and to docket the appeal.

Dated at Des Moines, Iowa, this 7th day of February, 1957.

ALBERT L. REEVES,
United States District Judge.

[fol. 79] (Relevant Docket Entries in United States District Court.)

(Title of Case)

1955

Nov. 8 Filed Petition for Removal from Polk County District Court.

Nov. 8 Filed Removal Bond. $1,000.00. Federal Insurance Company of New Jersey, Surety.

Nov. 9 Filed Notice of Removal with Acceptance of Service.

Nov. 14 Filed Order Enlarging time to Plea. Riley, J. (5 OJ 633)

Notice to Attys. 11/14/55.

Nov. 28 Filed Plaintiff's Demand for Jury Trial.

Dec. 5 Filed Defendant's Answer.

Dec. 10 Filed Pltffs' Reply to Deft's Answer.

1956

Mar. 3 Filed Memorandum and Order Overruling Pltffs' Motion to Remand. Harper, J. (6 OJ 84) Notice to Attys. 3-5-56.

1957

Jan. 10 Entered Jury impaneled; opening statements of counsel; evidence for plaintiffs concluded; motion of Deft. to direct jury to return verdict for Deft. overruled; evidence for Deft. concluded. Reeves, J. (6 OJ 635).

Jan. 11 Entered Procedure of trial; Deft's Motion for Directed Verdict overruled; Closing Arguments; Jury Verdict; Verdict for Maxine K. Hinkle in amount of $10,500.00 with interest at 5% from Feb. 26, 1955; written judgment to be prepared. Reeves, J. (6 OJ 639).

Jan. 11 Filed Pltffs' Exhibits 1; Deft's Exhibits A-1, A-2, B-1, C, D, E, F, G, H, I, J, K. (loose in file).

Jan. 15 Filed Judgment Entry, Reeves, J. (6 OJ 647) Notice to Attys. 1-15-57.

Jan. 15 Entered Judgment that plaintiff, Maxine K. Hinkle, have judgment against the defendant, New England Mutual Life Insurance Company of Boston, Massachusetts, in the amount of $10,500.00, with interest thereon from the 26th day of February, 1955, and the costs of this action, and that the plaintiff administratrix take nothing. Reeves, J. (6 OJ 647) Notice to Attys. 1-15-57.

[fol. 80]

Jan. 18 Filed Motion for Judgment Notwithstanding Verdict, with Certificate of Service.

Jan. 18 Field Memorandum Opinion on Motion for Judgment Notwithstanding the Verdict. Reeves, J. (Notice to Attys. 1-18-57).

Jan. 18 Filed Order Overruling Motion for Judgment Notwithstanding the Verdict. Reeves, J. (6 OJ 672) Notice to Attys. 1-18-57.

Jan. 18 Filed Pltff's Bill of Costs taxed at $40.65.

Feb. 7 Filed Deft's Notice of Appeal to Court of Appeals. Des Moines, Iowa, Feb. 7, 1957. A copy of Notice of Appeal mailed to L. S. Forrest, 25 Law Bldg., Drake University, Des Moines, Iowa, Attorney for Plaintiffs. E. E. Poston, Clerk, by /s/ Esther Lyons, Deputy Clerk.

Feb. 7 Filed Bond for Costs on Appeal. $250.00. Federal Insurance Company, Surety.

Feb. 7 Filed Order Extending Time for Filing Record on Appeal and Docketing Appeal. Reeves, J. (6 OJ 715) Notice to Attys. 2-7-57.

Feb. 7 Entered Defendant given not more than ninety (90) days from date of filing Notice of Appeal, to file record on appeal and docket the appeal. Reeves, J. (6 OJ 715).

Feb. 15 Filed Court's Copy of Transcript of Testimony.

[fol. 79]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION

Civil No. 3-659

MAXINE K. HINKLE, Administratrix of the Estate of W. MAX HINKLE, Deceased, and MAXINE K. HINKLE, Plaintiffs,

v.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, OF BOSTON, MASSACHUSETTS, Defendant.

MEMORANDUM AND ORDER OVERRULING PLAINTIFFS' MOTION TO REMAND—Filed March 3, 1956

Plaintiffs brought this suit in the District Court of Iowa in and for Polk County to recover from the defendant Insurance Company $10,500.00 on an alleged contract for insurance which she claims that her husband W. Max Hinkle entered into with the defendant on the 25th day of February, 1955, in Des Moines, when the latter delivered to him a receipt for $21.70 for "immediate coverage." Said receipt further provided that the insured was required to furnish defendant "satisfactory evidence" of his insurability. The parties agreed, according to the complaint, that a physical examination of Mr. Hinkle would be had before defendant's doctor on February 28, 1955. Unfortunately, Mr. Hinkle met his death on February 26, 1955, by the crashing of his own aeroplane and could not take a physical examination as was contemplated also by the receipt in question.

Defendant removed the action to this court on the ground of diversity of citizenship, stating in its petition therefor that it is a citizen of Massachusetts and that plaintiff in her individual capacity and as administratrix of her husband's estate is a citizen of Des Moines, Iowa. Plaintiffs

[fol. 80] moved to remand the action to the State Court, alleging in her motion as follows:

"1. They deny that part of paragraph 5 of the Removal Petition that states that the action is between citizens of different states, and the part that states that the Defendant is a citizen of Massachusetts."

"2. The Plaintiffs further state that the Defendant is a mutual life insurance organization and that the policyholders are the members thereof, and that the members thereof are in law Defendants in this action."

"3. * * * and that thus the citizenship of all Defendants is not diverse to that of the Plaintiffs; that some of the defendant members and policyholders are citizens of the same state as the plaintiffs."

"4. That insurance companies are now held to be engaged in commerce among the states, and Congress has undertaken to regulate them under its power to regulate such commerce, and the old law on the right to remove may be changed by acts passed under the commerce clause."

"5. That the Defendants have not met the burden that is upon them to establish jurisdiction of this claim in the Federal Courts."

Our concern now is not so much in the merits of the suit, but is centered on the question of citizenship of the parties. Plaintiff by her motion asks this court—an inferior Federal court—to abandon the doctrine established by our Supreme Court in *Louisville C. & R. Co.* v. *Letson,* 43 U.S. (2 How.) 497, that a corporation is a citizen of the state creating it. In the face of such declared and elementary law any argument contra must be addressed to an appellate court. We are bound to adhere to the long pronouncement of our highest court in this regard, and, accordingly, plaintiffs' motion to remand should be overruled.

ORDER

Upon consideration of plaintiffs' motion for remand of this action to the District Court of Iowa in and for Polk

[fol. 81] County, on the ground of lack of requisite diversity of citizenship between the parties hereto, and as stated in the court's memorandum filed herewith;

It is Ordered that plaintiffs' motion for remand be and the same is hereby overruled and denied.

Signed at Des Moines, Iowa, this 3rd day of March, 1956.

/s/ Roy W. Harper, United States District Judge, By Assignment.

[fol. 82]
United States of America,
Southern District of Iowa, ss.:

I, E. E. Poston, Clerk of the United States District Court for the Southern District of Iowa, do hereby certify that the annexed and foregoing is a true and full copy of the original Memorandum and Order Overruling Plaintiffs' Motion to Remand in No. 3-659 Civil Action, Maxine K. Hinkle, Administratrix of the Estate of W. Max Hinkle, Deceased, and Maxine K. Hinkle, Plaintiffs, vs. New England Mutual Life Insurance Company, of Boston, Massachusetts, Defendant, filed March 3, 1956, Central Division, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Des Moines, Iowa, this 26th day of December, A. D. 1957.

E. E. Poston, Clerk, by Fred O. Morrow, Deputy Clerk.

(SEAL)

[fol. 83]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,740

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS, Appellant,

v.

MAXINE K. HINKLE, Administratrix of the Estate of W. MAX HINKLE, Deceased, and MAXINE K. HINKLE, Appellees.

Appeal from the United States District Court for the Southern District of Iowa.

Phineas M. Henry (Ralph A. Church and Luther L. Hill, Jr., were with him on the brief) for Appellant.

Leland S. Forrest for Appellees.

Before Sanborn, Woodrough, and Van Oosterhout, Circuit Judges.

OPINION—November 5, 1957

VAN OOSTERHOUT, Circuit Judge.

Defendant insurance company has appealed from a judgment entered against it upon an alleged contract of [fol. 84] temporary life insurance. Jurisdiction based upon diversity of citizenship is established.

Rodney Bliss, Jr., general agent of the defendant, learned that W. Max Hinkle had made a mortgage upon his home. Hinkle was service and parts manager for the Onthank Company. Bliss, on February 25, 1955, called upon Hinkle at Hinkle's place of employment to sell him insurance. Defendant's decreasing term policy was fully explained to Hinkle. The policy discussed afforded initial insurance

coverage of $10,500 with coverage declining at the rate of $500 per year. Hinkle signed a written application for such a policy at standard rates and paid by check the initial quarterly premium. Thereupon, he was given a conditional receipt reading as follows:

"CONDITIONAL RECEIPT. DO NOT DESTROY.

Received Twenty-one and 70/100 Dollars in connection with an Application made this day to the New England Mutual Life Insurance Company, of Boston, Massachusetts, for Insurance of $10,500 on the life of W. Max Hinkle.

Immediate Coverage

"The insurance applied for shall be in full force and effect from this date, provided the Proposed Insured is now in good health, notwithstanding any change in the Proposed Insured's health or condition due to disease hereafter acquired or to any subsequent casualty; and provided that satisfactory evidence that the Proposed Insured is now insurable for the amount, plan and rating applied for is received at the Home Office of the Company in Boston; but if the Company determines that the Proposed Insured is not so insurable, said Application shall be declined and the amount paid will be refunded upon return of this receipt. If any check or draft given in payment of this premium is not paid on presentation, this receipt [fol. 85] shall be of no effect. This receipt is not valid unless countersigned for the Company by a duly licensed agent.

Philip C. Raye, *Secretary.*

Countersigned 2-25, 1955.

Rodney Bliss, Jr., General Agent.

If you do not hear from the Company within sixty days, notify the Company at Boston, and upon request and return of this receipt, the premium will be refunded."

The above receipt is upon a regularly printed form of defendant. The name of the proposed insured, the amount

of insurance, the premium, and the date were filled in by Bliss. Bliss also wrote in the words "Immediate Coverage" appearing in the receipt. He signed the receipt as general agent and delivered it to Hinkle.

It was understood between Bliss and Hinkle that Hinkle was to submit to a medical examination by the company's medical examiner. An appointment for such medical examination was made for February 28, 1955. There is a conflict in evidence whether the medical examination was deferred to February 28 to suit Hinkle's convenience or that of the company's doctor. Hinkle was killed on February 26, 1955, when the plane which he was operating crashed near Des Moines.

Plaintiff, Maxine K. Hinkle, widow of insured, brought this action individually, as beneficiary, and as administratrix of Hinkle's estate, alleging that defendant had assumed insurance coverage upon Hinkle because of the words "immediate coverage" written in the receipt by the agent, Bliss; and that, if such is not the situation, there is a conditional liability on the part of the insurer, and that all the conditions had been performed or excused or pre- [fol. 86] vented from occurring by the defendant. The court submitted to the jury only the claim asserted by the plaintiff individually as beneficiary. Mrs. Hinkle was designated as beneficiary in the application and was entitled to recover if at all as beneficiary.

Defendant at the close of the evidence made a motion for directed verdict which was overruled. The motion is set out in a footnote.[1] The jury found for the plaintiff

---

[1] Motion for Directed Verdict.

Now then at the close of the evidence the defendant moves the court to direct the jury to return a verdict for the defendant on Count IV of the petition on the following grounds:

1. The conditional receipt offered in evidence, and alleged to be a contract of insurance is not a contract, but a receipt delivered to evidence the payment of a first premium in connection with an application for life insurance, and the terms upon which the first premium was paid. It was merely a part of a transaction which constituted an application for life insurance. Said application was not completed and was not accepted by the defendant, and there was no meeting of the minds of the parties to form a contract.

2. The said conditional receipt was conditioned upon the receipt of satisfactory evidence at the home office in Boston that the

[fol. 87] and judgment for plaintiff was entered. Defendant filed a timely motion for judgment n.o.v., restating the grounds urged in his motion for directed verdict and adding a new ground as follows:

> "The defendant also moves the court for judgment in its favor notwithstanding the verdict on the ground that there was no evidence in the record to support a verdict for the plaintiff on the issue of fact submitted to the jury by the court, namely the good health of W. Max Hinkle on February 25, 1955, and that on that issue alone a verdict should have been directed for the defendant."

This appeal is based upon defendant's contention that the court erred in overruling its motions for directed verdict [fol. 88] and for judgment n.o.v. Defendant contends that it is entitled to judgment for the reasons stated in the motions.

---

proposed insured was insurable for the amount, plan and rating applied for. It appears from the record that no such evidence was sent to the home office of the defendant at Boston or received by it there, and in fact, no such evidence could have been furnished by the proposed insured in view of his aviation record.

3. The conditional receipt contemplated and expressly provided in the third clause of the printed matter therein "If the company determines that the proposed insured is not so insurable, said application shall be declined and the amount paid will be refunded upon return of this receipt." This provision requires and contemplates a determination by the company as to the insurability of the proposed insured for the amount, plan and rating applied for, and, provided that, if the company determines that the proposed insured is not so insurable, the application will be declined; that this provision negatives the construction of the receipt as being in itself a contract for temporary insurance.

4. The insertion of the words "immediate coverage" below the amount of insurance applied for in the conditional receipt does not convert the receipt into a contract of temporary insurance in view of the fact that a decreasing term policy was applied for, and the proposed insured was advised that the amount of insurance in the first year was $10,500, and would decrease annually thereafter.

5. If said receipt is construed to be a contract of insurance because of the addition of the words "immediate coverage" under

It appears to us that the vital question involved in this appeal is the construction to be given to the conditional receipt heretofore set out. The execution and delivery of the application, the payment of the premium, and the issuance of the receipt all occurred in Iowa. We agree with the parties that Iowa law controls.

---

the amount of insurance applied for, said contract is not binding on the defendant because the agent, Bliss, had no authority to make, alter or discharge any policies, contracts or agreements on behalf of or in the name of the company, or, to waive any forfeitures, or, except as otherwise agreed to in writing by a duly authorized officer of the company, to incur any obligations or liability for which the company should be responsible.

6. If said receipt is construed to be a contract of insurance, it is not a valid contract under the laws of Iowa because the defendant was prohibited by the statutes of Iowa from issuing contracts of insurance in an amount more than $10,000 without a medical examination duly passed and approved by the medical examiner or the medical board of the company. Section 508.28 of the Code of Iowa, 1954, requires or contains this language: "The Commissioner of Insurance shall decline to approve any form of policy unless insurance is based upon the satisfactory medical examination of applicant by a physician, and no policy or contract shall be issued by any insurance company to any individual until such examination has been passed and duly approved by the medical examiner or the medical board of the company." And then in a subsequent section there is a provision that non-medical insurance may be issued up to $10,000.

7. It appears from the record that there was no medical examination because of failure of the proposed insured to have an examination. Therefore, he failed to furnish an application upon which the defendant, under the law of Iowa, could insure his life for $10,500.

8. It appears from the evidence that the proposed insured was informed that a medical examination was necessary in connection with his application for life insurance. His failure to take said medical examination, as shown by the record, was not due to any act or neglect on the part of defendant, and there is no evidence that said medical examination was waived by the defendant.

9. It appears from the evidence that because of the proposed insured's aviation record, he was not insurable for the plan and rating applied for under the defendant's underwriting rules and practices. Regardless of whether the answer to Question 17 (a) in the application was written by the agent before or after the proposed insured signed the application, if he had answered "yes" to said question he was not insurable for the plan and rating applied for.

One of the leading cases in the field of temporary life insurance is *Reynolds* v. *Northwestern Mutual Life Ins. Co.*, 189 Iowa 76, 176 N.W. 207. In that case the Iowa court had occasion to consider a conditional receipt very similar to the one now before us. There, as in our present case, the first premium had been paid. In the *Reynolds* case the condition was, "provided the said company in its judgment shall be satisfied as to my insurability, on the plan applied for, on the date of such medical examination." Here, the material condition is, "provided that satisfactory evidence that the Proposed Insured is now insurable for the amount, plan and rating applied for is received at the Home Office of the Company in Boston." The Iowa court in *Reynolds* recognized that preliminary contracts of insurance are valid and enforceable. The court then states that the contract must be construed as a whole, and effect must be given to the condition relating to insurability. The court says (p. 209):

> "* * * The insurability of the applicant on the date of the medical examination is, by the contract made the test of the company's liability."

The court construes the contract as a whole as follows (p. 209):

> "* * * Unless the application is in the proper exercise of the company's rights, under the law and the [fol. 89] contract, rejected, and the insurance refused, the preliminary contract provides protection from the date of the medical examination, and if death results from some cause arising after the date of such examination, the company is liable upon the contract, according to its terms: but if the company, in the proper exercise of its legal rights, under the law and the contract, which it is unnecessary for us to define in this opinion, rejects the application upon the ground that the applicant is not insurable and returns the premium paid, no liability can arise thereunder."

In the *Reynolds* case the applicant died before the completion of the investigation as to his health. The insurer,

after applicant's death, rejected the application upon the ground that the applicant was not an insurable risk on the date of the medical examination. The Supreme Court of Iowa determined that the trial court had properly found as a matter of law that the insurer had in good faith rejected the application on the ground that the applicant was not insurable for the policy applied for, stating (p. 210):

> "* * * The record, we think leaves no doubt that he was not entitled to insurance and that no liability existed upon the contract. The fact that the company did not, prior to his death, know that deceased had been for several months afflicted with heart trouble, should not be given controlling importance. It goes to the question of his insurability. * * *"

That the subject of temporary life insurance pending approval of application or issuance of policy has caused the courts considerable difficulty is demonstrated by an exhaustive note in 2 A.L.R. 2d 943. The wording of the binders or conditional receipts involved in the decided cases varies considerably. The author of the cited annotation, at p. 960, classifies the types of contracts of temporary insurance in general use as follows:

> [fol. 90] "(1) The first type of contract, around which most of the existing conflict centers, usually provides that any insurance shall, by reason of the payment of a premium at the time of the application, be in force from the date of the application (or of the medical examination), provided the application shall be approved and accepted, as applied for, at the home office of the insurance company.
>
> "(2) Another type of receipt provides that the insurance shall be effective as of the date of the medical examination, if the company shall be satisfied that on that date the applicant was an insurable risk and that the application was otherwise acceptable under the company's regulations for the amount and plan of the policy applied for. In some instances the date of the

application is taken instead of the date of the medical examination.

"(3) In a third type of receipt the provision is that the insurance shall be in force as of the date of the application or the medical examination if the company at its home office shall issue the policy on the plan applied for. In some instances delivery of the policy is required.

"(4) The fourth type of receipt is represented by the unconditional provision that the insurance shall take effect as of the date of the approval of the application by the insurer."

The conditional receipt we are considering would appear to be of the class described in paragraph 2. The variance is that in our present case the effective date of the insurance is made the date of the receipt rather than the date of the medical examination. The annotator, at page 987, cites authorities upholding the validity of a condition of insurability, among them, *Reynolds* v. *Northwestern Mutual Life Ins. Co.*, supra; *Warren* v. *New York Life Ins. Co.*, 5 Cir., 128 F.2d 671; *Gonsoulin* v. *Equitable Life* [fol. 91] *Assurance Society*, 152 La. 865, 94 So. 424; *Equitable Life Assurance Society* v. *Robertson*, Mo. App., 191 S.W. 989.

The application and conditional receipt in *Mofrad* v. *New York Life Ins. Co.*, 10 Cir., 206 F.2d 491, are of the same general type we are here considering. In that case a directed verdict for the insurer was affirmed upon the basis that the insurance was not in force because the applicant had not met the insurability test. The court upon the issue of construction states (pp. 493, 494):

"* * * 'A contract of insurance rests upon and is controlled by the same principles of law applicable to any other contract. What the contracting parties intended, mutually agreed to, and their minds met upon, is the measure of their obligations.' * * * And if the intentions of the parties are clear from an examination of the contractual documents, this court will not rewrite the contract. * * *"

> "The application for the policy provided that the insurance policy should be dated as of the date of the application. 'It was within the rights of, and was competent for, the parties to provide in the application under what conditions and at what time the policy should become effective and binding.' *Jones* v. *New York Life Ins. Co.*, 1927, 69 Utah 172, 293 P. 200, 202. The provisions in the application agreement do not fix the effective date of the insurance contract. They simply impose conditions precedent to the taking effect of the insurance coverage. *Shira* v. *New York Life Ins. Co.*, 10 Cir., 1937, 90 F.2d 953. When read together, they mean that the insurance coverage shall take effect only in the event the conditions precedent specified in the application are fulfilled, and then only as of the date of the application. * * * "

As pointed out by Judge Clark in his concurring opinion in *Gaunt* v. *John Hancock Mutual Life Ins. Co.*, 2 Cir., 160 F.2d 599, 603, the insurability condition is much fairer to the insured than the approval condition. Under the [fol. 92] approval condition absolute power remains in the insurer to reject the risk. Under the insurability condition the risk can be rejected only in the event a good faith determination is made of lack of insurability as of the time the temporary insurance was to become effective.

The effect of the words "Immediate Coverage" written into the receipt by the agent must be considered. Under the *Reynolds* case, supra, a receipt such as the one we are considering provides immediate coverage, subject to the provisos setting out the circumstances under which the insurance would not be in effect. Unless the words "Immediate Coverage" were intended to eliminate the conditions agreed upon, the addition of the words does not change the meaning of the contract. We observe that the receipt is labeled "CONDITIONAL RECEIPT" in large letters. The conditions are plainly stated in the receipt. The conditions were not eliminated from the receipt, nor were they expressly waived. The conditions remained a part of the receipt as delivered. We do not believe that it can fairly be said that the addition of the words "Immediate Cov-

erage" was intended to eliminate the conditions. Under such a construction of the contract as a whole, we do not reach the serious question of the authority of the agent, Bliss, to alter the receipt or to agree to immediate unconditional coverage.

From our consideration of the authorities heretofore cited, we believe that the Iowa court would not find the conditional receipt before us ambiguous, and would construe it as providing insurance from the date of the receipt, subject to the condition that if the insurer rejects the application in good faith for valid reasons upon the ground that the applicant is not insurable for the amount, rating, and plan applied for, and the premium is returned, no [fol. 93] liability will exist even if death occurs before notice of rejection. The check given for the premium was never cashed. It was returned to the beneficiary and later sent to the defendant by plaintiff's attorney. The insurer has tendered its return.

Defendant contended in its motions in the trial and contends here that there could be no valid temporary insurance, relying upon language in the *Reynolds* case, supra, relating to insurability upon the date of the medical examination. In the *Reynolds* and some of the other cases relied upon by defendant the conditional receipt called for insurability on the date of the medical examination. In our present case the receipt provides that the insurance applied for shall be in effect from this date (obviously meaning the date of the receipt), subject of course to the provisos. There is nothing in Part I of the application inconsistent with the receipt. The application provides that if the premium is paid with the application "the insurance shall take effect as stipulated in the Conditional Receipt." The conditional receipt on the basis of the words it contains can not fairly be construed to add the medical examination as an additional condition precedent. Whether by implication of law such a condition is to be read into such receipt because of section 508.28 of the Code of Iowa, 1954, prohibiting the issuance of a policy of life insurance for more than $10,000 until a satisfactory medical examination shall have been passed and approved by the medical examiner or medical board of a life insurance company, raises an

unsettled question of Iowa law upon which we deem it unnecessary and, hence, inadvisable to express an opinion.

It was contemplated by the parties that the proposed insured submit to medical examination. By mutual agree-[fol. 94] ment such examination was deferred until February 28, 1955. At the time of the application no one anticipated the proposed insured's untimely death. The fact dispute as to who requested the postponement of the medical examination has no bearing upon the result we reach.

The conditional receipt we are considering contains two provisos, the first pertaining to good health and the second to insurability. The trial court submitted the issue of the good health of the applicant at the time of the application to the jury, and in effect told the jury that if they found for the plaintiff on this issue, the verdict should be for her. The jury found for the plaintiff.

There is serious doubt whether the question of the sufficiency of the evidence to sustain the jury's verdict upon the good health issue is properly before us for review. Since we consider our determination upon the insurability issue, hereinafter discussed, decisive of this case, we shall assume without deciding that there was enough evidence to make the issue of good health, standing alone, one of fact for the jury, and that the jury's finding that the applicant was in good health is binding upon us.

This leaves for consideration the condition as to insurability. The trial court took the position that good health and insurability are practically synonymous. In so doing the trial court erred. While there are some authorities to support such position, the weight of authority and the better rule are contrary. Good health is an element of insurability, but is only one of many elements to consider upon the issue of insurability. The authorities on the meaning of insurability are ably discussed in *Kirby* v. *Prudential Insurance Company of America*, Mo. App., 191 S.W.2d 379, 162 A.L.R. 660. The court concludes:

> [fol. 95] "We cannot say that the term insurability is ambiguous and is susceptible of two different interpretations, one of which is 'good health.' It is not

thought that the man on the street would so construe the term. Probably most people know that to be insurable one must have good health; but they also know that good health is not the only factor about which insurance companies are concerned in the issuance of policies. They know that insurability means more than good health."

In *Rosenbloom* v. *New York Life Ins. Co.*, W. D. Mo., 65 F.Supp. 692, Judge Ridge quotes with approval from the *Kirby* case and states (p. 696):

"* * * From the opinion in the *Kirby* case, supra, and the authorities cited therein, it is manifest that the term 'insurability' is a term of art when used in conjunction with life insurance. 'Insurability' as a term of art signifies all those physical and moral factors reasonably taken into consideration by life insurance companies in determining coverage or matters affecting the risk."

In reversing the *Rosenbloom* case on other grounds this court said (163 F.2d 1, at p. 4):

"* * * For the purposes of this opinion, we assume that 'insurability' may include elements other than health—such as vocation. * * *"

In *Kallman* v. *Equitable Life Assurance Society*, 248 App. Div. 146, 288 NYS 1032, the court speaks as follows:

"* * * The distinction between 'good health' and 'insurability' might be illustrated in the case of a criminal condemned to death. On the eve of his execution he might be found to be in perfect physical condition, but it could not be reasonably contended that his situation did not affect his insurability. There are numerous circumstances which affect insurability. * * *"

[fol. 96] In *Warren* v. *New York Life Ins. Co.*, supra, the premium had been paid, and the insurability proviso was similar to that in the present case. Applicant had made negative answers to aviation questions. From investiga-

tion the insurer learned of applicant's flying, suspended the application, and requested applicant to fill out an aviation form. The applicant died in an automobile accident before this was done. Recovery was denied upon the basis that no insurance was in force. The insurability proviso is not discussed. However, in the District Court opinion, 37 F.Supp. 358, 362, in considering the materiality of false representations as to insurance, the court states, "The risk caused by participation in aeronautics is a serious one." In *Kirby* v. *Prudential Insurance Company of America*, supra, the court approved the finding of the trial judge against an applicant for reinstatement on the basis that the applicant was engaged in aeronautics and that such activities substantially increased the risk, stating that the trial court could not properly have found otherwise.

We find the reasoning of the cases holding "insurability" is broader than "good health" to be sound and convincing. For the purposes of our present case it is not necessary to determine just how broad the scope of the term "insurability" is. We are satisfied that an insurer is justified in taking into consideration a hazardous activity, such as flying, in determining insurability.

The undisputed evidence shows that the proposed insured had held a pilot's license since 1946, and that he had owned an interest in a plane continuously since 1951. He flew every Sunday when the weather permitted, and his 1954 license showed he reported 1450 hours of flying time. The evidence likewise establishes that the insurer [fol. 97] uniformly declined to accept at standard rates risks of applicants engaged in flying. The company's policy in the case of applicants engaged in aviation was to require the applicant to fill out an aviation questionnaire which, among other things, asked the applicant whether, in the event the policy could not be delivered at standard rates, he desired a policy at standard rates with an aviation exclusion, or full coverage at extra premium. The extra premium for aviation coverage was $3.75 per thousand per year, which would have increased the premium on the policy applied for nearly 50 per cent.

The questions on the application pertaining to aviation were answered by applicant in the negative. The application contains a certification that the information appearing

on the application is correctly recorded. Hinkle signed the application. Bliss testified that aviation questions were asked and the answers properly recorded. We have serious doubt whether there is any substantial evidence to the contrary. Mrs. Hansen, a fellow employee of applicant, who had testified in the case in chief, was recalled in rebuttal, and testified that she was within a few feet of applicant's desk at the time the application was filled out. She said she didn't pay much attention to the conversation, but that she knew Mr. Hinkle flew frequently and to the best of her recollection she did not hear any mention of aviation.

In the briefs of the respective parties, each is seeking to blame the other for the false answers to the aviation questions, and to assert rights based upon such contentions. The trial court in its instructions to the jury said:

> "Now, ladies and gentlemen of the jury, my viewpoint is such of this case that it is wholly unimportant whether Mrs. Hansen heard part or all, or anything of [fol. 98] that sort, because here is a contract that says if he were in good health at the time then there was temporary insurance that would pay his beneficiary the amount of the insurance. If he were not in good health then he is not entitled to recover regardless, because this conditional receipt only refers to an application. It makes no difference what was said in that application in my judgment. * * * "

Neither side excepted to the instructions given, or requested instructions on the theories they are now advancing. We do not believe that the question of who was responsible for the false answers as to aviation on the application is of any importance on this appeal. The defendant was not limited to information contained in the application in passing upon the question of insurability. The defendant had before it the information as to aviation before it acted on the application.

It is apparent that the application for insurance was for insurance at standard rates. The premium was paid upon the basis of standard rates. No information was disclosed by the applicant to the effect that he was engaged

in flying. The evidence conclusively shows that the proposed insured, because of his aviation activities, was not insurable for the amount, plan and rating applied for, and that the defendant made a good faith determination that he was not so insurable. The fact that Hinkle might have been able to obtain insurance at a higher rate is of no help to the plaintiff as such was not the coverage applied for.

Defendant in its pleadings asserts that if temporary insurance existed it was conditional, and that the insurance never became effective because the condition as to insurability was not met. This issue is also raised in the motions for a directed verdict and for judgment n.o.v. Plaintiff complains that the defendant did not fully investigate [fol. 98a] applicant's insurability. Sufficient information of applicant's aviation activities, evidence as to which was introduced at the trial, came to the defendant to warrant it in good faith to determine that the applicant was not an insurable risk for the plan applied for. The applicant died in an airplane crash the day following the application and before the application could have reached the home office. There was no time for investigation prior to the applicant's death. Any delay in the investigation under such circumstances was in no way prejudicial to plaintiff.

The defendant was legally entitled to have its motion for directed verdict sustained upon the basis that the insurance was not in effect at the time of the applicant's death, for the reason that the applicant did not, and could not, meet the insurability condition set out in the conditional receipt because of his aviation pursuits.

Other issues argued by the parties have been considered, but do not warrant discussion for the reason that what has heretofore been said compels a reversal.

The judgment appealed from is reversed, and this case is remanded with directions to enter judgment for defendant.

Woodrough, Circuit Judge (Dissenting).

The controversy here grows out of a well known kind of transaction between the insurance company and a so-called "proposed insured" that is soundly helpful to the

business of selling life insurance, but has been unhappily considered in such a way as to bring discredit on the com-
[fol. 99] panies and grief and suffering on certain unfortunate widows and orphaned children.

In the life insurance business it takes a little time for the companies to check on insurability of prospects and sometimes to adjust clerical or other incidental details and that little delay hampers the selling of life insurance on which the existence of the companies is dependent. To meet that condition, the insurance agents are supplied with the printed form such as was used in this case, headed in bold type "Conditional Receipt", the terms of which enable the agents to assure a prospective purchaser of life insurance that he will not be affected by that unavoidable little delay, but that if he is in good health, he will have (in this case) $10,500.00 insurance on his life in full force and effect from the day he delivers the amount of the first premium to the agent. The conditional receipt bears conspicuously the name of the company (in this case, New England Mutual Life Insurance Company) and the signature and counter signature of company officers; to-wit: General Agent and Secretary, and distinguishing between the time after the necessary delay when a proper policy is conditionally to be issued, and the time of the transaction, the General Agent inserts the date of the transaction conspicuously in writing in the blank for that purpose so that the instrument reads, "Insurance applied for shall be in full force and effect from this date provided the proposed insured is now in good health"—(in this case the date of payment, February 25, 1955, was written in with a pen,) "2/25/1955" and the printing included "this day" (twice repeated) "this date" and "now"; all being used in the instrument to stress that the transaction relates to the undertaking of a present obligation by the company and not to the policy of life insurance that is to be issued later, only on certain conditions.

[fol. 100] Laymen who are solicited in this transaction understand perfectly that when they pay the money and get the receipt, they have the company's obligation to pay if they die before the final closing of their insurance deal. In this case when the "proposed insured" left his home to

go to his death the next day, after he made his payment to the agent, he left the "Conditional Receipt" the company gave him where his wife would find it and know he thought of her and believed he had provided for her.

The transaction with the company's agent that caused that belief was an entirely fair one and involved no discrimination in favor of the receipt holder and no unfair burden on the company.

In the first place if the proposed insured lied when he said he was in good health, there was no liability on the company. The first and only condition precedent to the obligation the company declared in its receipt, namely, that the insurance was immediately affective, (sic) was as above stated, that the "proposed insured is now in good health."

The other condition in the receipt was a condition subsequent to the company's obligation declared in the receipt to the effect that if, after its date, satisfactory evidence of the proposed insured's insurability was not received at the company's home office in Boston or if the company determined he was not insurable, it would decline his application for a policy.

This condition of the receipt is not incompatible or in conflict with the company's obligation for "insurance in full force from this date." The two accord fully with each other. The words of the receipt make it perfectly plain that the company would not ultimately issue an insurance policy unless the company became satisfied of [fol. 101] insurability. But that had nothing to do with the willingness of the company to make and fulfill the obligation concerning "insurance in effect from this date" declared in the receipt.

When Mr. Hinkle died, the day after the receipt had been delivered to him and his money had been accepted, all of the conditions upon the company's obligation to pay the amount of $10,500.00 specified in the receipt had become satisfied and the company should pay. The situation then was simply that the company had agreed that if Mr. Hinkle died the money would be paid and if he survived, the matter would go forward to the issuance of a policy or denial of it. After his death there was no point or sense in going on with any inquiry about his eligibility for a life

insurance policy of any particular kind or about any other detail that might have come up if he had not died and if the transaction had been proceeded with.

There is no element of harshness or unfairness to the company or discrimination towards its patrons in the transaction with the receipt. The terms of the receipt protect the company and forestall such a consequence. The receipt specifies that on determining non-liability, the company will refund the payment made to it by the proposed insured, but it does not state in express words what is to be done with the money paid on the happening of death while the "insurance is in full force from this date" before such company determination. Neither does it state what is to be done with the money if the policy issues. Manifestly the death obviated making the determination as to insurability so that the payment in the hands of the company has to be applied in accord with the necessary implication of the transaction in which it was paid and received.

[fol. 102] The recital of the receipt is that the payment was "in connection with the application for insurance of $10,500.00 on the life of W. Max Hinkle" so that the company's right to apply it on the temporary coverage is complete and exactly as clear as its right to apply it on the first premium of a policy would have been if such policy had issued. So far as applying the payment is concerned, the same words cover both situations.

The payment manifestly was amply sufficient to fully compensate the company for the risk it took under its obligation for insurance in full force and effect from "this date". That is practically demonstrated by the fact that insurance for short term is daily and hourly sold throughout the country through vending machines that deliver a policy for $10,000.00 to anybody and everybody who deposits a fifty-cent coin in the slot. The record shows that the insurance herein was to cost $20.70 a quarter or $82.80 per year of 365 days or 22¢ a day.

In the transaction herein involved it is true the company stood to absolutely lose that 22¢ a day if Mr. Hinkle lived and his application was declined. In that event it was obligated to refund the entire $20.70. But the part of that refund the company would lose if the company had to

make it probably would not equal the cost of the time of the agent soliciting or of an advertising calendar or gadget also risked to obtain a new policy holder who might well be expected to bring in hundreds or even thousands of dollars of premiums.

It might be only "petty stuff" to give a short year's insurance for a full years premium, but it is such a serious wrong for a company to make a man believe it has insured him and to take his money therefore, (sic) if it does not so [fol. 103] intend and I see no reason to ascribe such a thing to the company in this case.

I am not convinced that the few Iowa cases cited prohibit sustaining the judgment for the widow in this case. I would affirm the judgment.

[fol. 104]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15740—September Term, 1957.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS, Appellant,

v.

MAXINE K. HINKLE, Administratrix of the Estate of W. MAX HINKLE, Deceased, and MAXINE K. HINKLE.

Appeal from the United States District Court for the Southern District of Iowa.

JUDGMENT—November 5, 1957

This cause came on to be heard on the record from the United States District Court for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said

District Court, in this cause, be, and the same is hereby, reversed with costs; and that New England Mutual Life Insurance Company of Boston, Massachusetts, have and recover against Maxine K. Hinkle, Administratrix of the Estate of W. Max Hinkle, Deceased, and Maxine K. Hinkle, the sum of Three Hundred Eighty-one and 15/100 ($381.15) Dollars for its costs in this behalf expended and have execution therefor.

And it is further Ordered by this Court that this cause, be, and the same is hereby, remanded to the said District Court with directions to enter judgment for defendant.

November 5th, 1957.

[fol. 105] Petition for rehearing covering 19 pages filed November 22, 1957 omitted from this print.

It was denied, and nothing more by order December 6, 1957.

[fol. 129]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER DENYING PETITION OF APPELLEES FOR REHEARING, ETC.—December 6, 1957

On Consideration of the petition of the appellees for a rehearing and the request for consideration by this Court en banc in this cause, It is now here Ordered that the same be, and they are each hereby, denied.

[fol. 131]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—December 18, 1957

On Consideration of the motion of the appellees for a stay of the mandate in this cause pending a petition to

the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 133] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 135]

SUPREME COURT OF THE UNITED STATES

No. 714—October Term, 1957

MAXINE K. HINKLE, Administratrix of the Estate of W. MAX HINKLE, Deceased, and MAXINE K. HINKLE, Petitioners,

v.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS.

ORDER ALLOWING CERTIORARI—March 10, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.
